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CURRENT EVENTS.

METHODS OF PUNISHMENT—THE MINES.—The object of legal punishment of crimes which rise to the dignity of felony, is not the reformation of the offender. That idea, dear as it may be to professed humantarians, is with practical people utterly "played out." Nor is punishment designed to gratify private vengeance, or, as it is vaguely phrased, "to vindicate the majesty of the law."

The real object of punishment is to prevent the future commission of crime by the convict and by others. Of capital punishment we have nothing at present to say. If a man is bad enough to be hanged, he is hanged, and "there's an end." We speak only of felons whom the gallows spares. The methods of punishment of such offenders have been very numerous and various. In many countries of Europe convicts were formerly sent to the galleys, and their treatment was so cruel that the phrase "a galley slave" has become in all modern languages a synonym for the extremity of misery and degradation. In England, transportation to penal colonies was the favorite method of punishment, and in those colonies the convicts were, to all intents and purposes, slaves in the worst sense of the word. In our own country, within living memory, the old regimen of the whipping post, the pillory, the branding iron and the county jail, has in nearly all the States been superseded by the penitentiary system, which has been generally satisfactory. But now in some of the States seems to be impending a new departure, or, more properly perhaps, a recurrence to some of the worst methods of other countries and of ruder times. In some of the States the penitentiary is becoming a sort of receiving ship where convicts abide until they are sold into slavery, or farmed out, if that euphuism is preferred, to the highest bidder or to favored contractors. In due season, if this course is persevered in, it is safe to predict the worst horrors of the galley of the penal colonies, even of Norfolk Island and the Siberian mines, will be reproduced in our own country.

It is merely idle to say that due precautions will be taken that the convicts will be protected against inhuman treatment by government officers specially appointed and paid for that purpose; that nothing shall be required of convicts out of the penitentiary that would not be required of them within it. The fatal error in this matter is the admission of private interest, in any form whatever, into the public punishment of crime. There arises at once a temptation, and it is always a mistake and a misfortune to subject official virtue to avoidable temptation. It is always upon the cards for the cupidity and ingenuity of contractors to find the means of "squaring" the custodians of the convicts and then mercilessly exacting from the wretches whom they have bought, regardless of health or life, the most extreme exertions of which the human frame is capable.

In its best estate "a prison is a house of care." The horrors of prison life have been described in sober prose by philanthropists who have striven to reform its abuses, and depicted with the embellishments of fancy in fiction and poetry, but we have never encountered a more revolting picture than that presented by the subterranean prison in which drudge in damp and darkness, the convicts who are farmed or sold to contractors. We can only compare it to that very notable prison described by Dante, over the entrance to which was the inscription:

"Abandon hope, ye who enter here."

We trust we will not be misunderstood. Our views on the punishment of crime are perfectly orthodox and free from the slightest tincture of sentimentality. Felons duly convicted of crimes, capital by the law of the land, we think, ought to be hanged. Felons to whose crimes the law does not award capital punishment should be imprisoned in the penitentiary, with or without hard labor, according to the terms of the law and the sentence of the court. And this should be done at the expense of the State. If the labor of convicts *in the penitentiary* can, without detriment to the labor of honest citizens, be made to pay part of the prison expense, the proceeds of that labor should be so applied; if there is a deficit, let the State discharge its duty and pay up like a man. Let the pris-

oners be always and solely under the control of officers appointed and paid by the State. Let no outsider have anything to do with the convicts, and no interest, great or small, in their labor.

What we protest against is the pitiful economy, by reason of which the State foregoes its supreme control of its own convicts, and admits to a sort of partnership and a share of that control private citizens who have no sort of interest in the matter, except the hope of making money out of the connection.

An interesting case connected with this subject has been recently decided in Kentucky. It seems that the legislature of that State authorized the commissioners of the sinking fund to farm out the labor of the convicts in the Kentucky penitentiary to persons engaged in mining operations. Under this authority the commissioners made a contract with the Mason and Ford Company, by which they hired to them a number of convicts. The Mason and Ford Company sublet in their turn a number of these convicts to the Jellico Mining Company, who, presumably, had the benefit of their labor, but refused to pay for it, acting apparently upon Falstaff's *dictum*, "base is the slave that pays." The Mason and Ford Company thereupon sued the Jellico Company for the hire they had agreed to pay for the convicts. The Jellico Company defended the suit on the ground that the whole transaction was illegal, and the court, Judge Toney delivering the opinion, decided in their favor. Judge Toney held, as well he might, that the legislature usurped judicial functions by directing that the convicts, sentenced by a court of competent jurisdiction to confinement and hard labor in the Kentucky penitentiary, should be confined and perform that labor in the bowels of the earth many miles away. He further held, that if the legislature had any power to authorize the sinking fund commissioners to farm out convict labor to persons engaged in mining operations, their grant did not extend to subletting by the first contractors. Therefore, even if the grant of the commissioners to the Mason and Ford Company was valid, the contract of the latter with the Jellico Company was void.

This case illustrates strikingly the very lax ideas of legislative duties, with reference to crimes and criminals which are now becoming prevalent. The Kentucky legislature seems to have regarded convicts in the light of chattels, useless and expensive, which must be disposed of in the cheapest and most expeditious manner possible. Economy is the dominant principle of all the legislation on this subject, and we rather wonder that it has, as yet, stopped short at such half measures. Why not sell out the penitentiary altogether, sentence the convict directly to the mines, require the contractor to pay all the costs of the trial, and a good round sum by way of hire besides? By this means the State could put money in its purse, and be fairly rid of the convict until he shall, what is left of him, emerge from the earth when his term of servitude shall have expired. This system would certainly be the cheapest, but whether it would not engender horrors and cruelties which would shock every sense of mercy and humanity is another and altogether a different question.

NOTES OF RECENT DECISIONS.

WILLS — CONSTRUCTION — PRESUMPTION OF DEATH.—The Supreme Judicial Court of Maine, in a recent case[1] applies the well known doctrine of the the presumption of death after the lapse of seven years, during which the supposed decedent has not been heard from, to the construction of a will. The testatrix bequeathed a sum of money to her son, of whose existence she was doubtful, provided he should appear or be heard from within ten years after her death. The ten years expired without any tidings of the long lost son reaching the ears of the executor. The court held that the legacy passed into the residuum of the estate, which had been disposed of by the terms of the will. The case suggests several questions which, without attempting a solution, we propound for the consideration of our readers. If a testator, hoping against hope, should devise an estate to a person who had not been heard from for more than seven years, and was therefore presumed in law to be dead, and should make no residuary provision disposing of that estate, would the devise be void be-

[1] Leader v. O'Loughlin, S. J. C. Me., 12 Atl. Rep. 787.

cause the devisee was a person incompetent to take the devise? And if the devise is not void, who would hold the legal title pending the reappearance of the devisee? And how long could the estate remain in that condition of suspended animation? And if the devise is void for the reason above stated, and the testator should die intestate as to that estate, could his heirs hold the property as against the devisee, if, by any chance, he should reappear? In other words, could the devise be held void and inoperative because there is no person *in esse*, by presumption of law capable of taking the estate under it, and yet could the devise create a trust under which the heirs would hold the property for the contingent benefit of the person named as devisee in the will? We submit these mortuary conundrums for the consideration of those who would like to delve in the old books for their solution.

NUISANCE—CHURCH BELLS—DAMAGES.—A rather curious case[1] was decided some time ago by the Supreme Judicial Court of Massachusetts. It seems that the plaintiff, who, by reason of a sunstroke, was particularly susceptible of annoyance by loud sounds, resided in the immediate vicinity of a church, and suffered very much from the noise of the ringing of its bells. He brought an action for damages against the custodians of the church.[2] The decision was against him, and, upon appeal, his exceptions were overruled. The court held that in order to become a public nuisance, the ringing of church bells, even in thickly populated neighborhoods, must be such as would cause serious annoyance to persons of ordinarily healthy nerves.[3] The rule is said to be that to constitute a claim for damages for a private nuisance, the annoyance must be such as would affect all persons alike, and that it would be impossible to discriminate in favor of persons peculiarly susceptible of such annoyance or diseased in so unusual a manner that the noise or other disturbance would be insupportable to them.

The court, in this case, takes a very prosaic view of the matter and utterly disregards the antipathies and repulsions, so common to sensitive people, of which Shakespeare furnishes some specimens in the following lines:

> Some men there are love not a gaping pig;
> Some that are mad if they behold a cat;
> And others, when the bag-pipe sings i'the nose.
> Masters of passion sway it to the mood
> Of what it likes or loathes.

TRUST — TRUSTEE — PURCHASE OF TRUST ESTATE BY TRUSTEE—REMAINDERMAN—CONSTRUCTIVE FRAUD.—The subject of trust and the duties and liabilities of trustees was interpreted by the Supreme Court of Pennsylvania in a recent case.[1] The facts were that a testator devised an estate to a person to hold as trustee for one then living, for life; and a remainder was limited to other persons. The *cestui que trust* became indebted to the trustee, who obtained a judgment against him and caused the execution to be levied upon the trust estate, which was duly sold and bought by the trustee at much less than its value. In due time the case came under investigation by the court upon charges of constructive fraud, made by the *cestui que trust* against the trustee, and the court held that the fiduciary relation existing between the parties prohibited the trustee from purchasing at sheriff's sale the estate which he held in trust for less than its value; and further, that he could acquire no title by such a sale, and that he was responsible to the *cestui que trust* for the rents and profits which he had received while holding the land under the execution sale, and that the whole course of his proceeding in the matter was a breach of his duty as trustee and constructive fraud upon the beneficiary.

[1] Appeal of Ricketts, S. C. Penn., Jan. 16, 1888; 12 Atl. Rep. 60.

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[1] Rogers v. Elliott, S. J. C. Mass., March 2, 1888; 15 N. E. Rep. 768.

[2] Fay v. Whitman, 100 Mass. 76; Davis v. Sawyer, 133 Mass. 289; Walter v. Selfe, 4 De Gex & S. 323; Soltan v. De Held, 2 Sim. (N. S.) 133; Smelting Co. v. Tipping, 11 H. L. Cas. 642.

[3] Crump v. Lambert, L. R. 3 Eq. 408; Sparhawk v. Railway Co., 54 Pa. St. 401; Westcott v. Middleton, 43 N. J. Eq.; S. C., 11 Atl. Rep. 490; Wesson v. Iron Co., 13 Allen, 95.

VIEW BY JURY.

I. In England, at Common Law and Under Statute.
II. In America,
(a.) Basis of Authority to Order View.
(b.) When Granted—Discretion of Court.
(c.) Purpose and Intent of the View.
(d.) In What Civil Cases the View May be Granted.
(e.) View in Equitable Actions.
(f.) View in Proceedings Under Powers of Eminent Domain.
(g.) View in Criminal Cases.
(h.) Conduct of the View.

I. *In England, at Common Law and Under Statute.*—At common law the view by the jury existed only in certain real actions. In such actions after the demandant had counted, the tenant might demand a view of the land.[1] The purpose of the view was that the tenant might know with certainty the land in litigation. The view was not granted in personal actions.[2] Afterwards, by § 8 of the statute 4 Anne, ch. 16, the court was authorized, in actions of waste, trespass, ejectment, etc., when it appeared to be proper and necessary that the jurors should, for the better understanding of the evidence, have a view of the messuages, lands, or place in question, "to order special writs of *distringas* or *habeas corpora* to issue, by which the sheriff or other officer to whom they are directed shall be commanded to have six, out of the first twelve of the jurors named in such writs, or some greater number of them, at the place in question, some convenient time before the trial, who then and there shall have the matters in question shown to them by two persons in the said writs named, to be appointed by the court; and the said sheriff, or other officer, who is to execute the said writs, shall, by a special return upon the same, certify that the view hath been had according to the command of the said writs." By the statute 3 George, II., ch. 25, § 14, it was enacted that "where a view shall be allowed, six of the jurors named in such panel, or more, * * * shall have the view, and shall be first sworn, or such of them as appear, upon the jury, before any drawing as directed by the act." It would appear from the language of the statute of Anne that the intention of parliament to confine views to cases where, in the discretion of the court, it appeared necessary, is sufficiently plain, but, notwithstanding, a custom arose of granting the view as a matter of course upon the motion of either party, and notwithstanding the language of the terms of the statute of George II., a notion prevailed that six of the first twelve jurors upon the panel must attend the view, and that if they did not appear upon the trial the cause must be put off. In this way the trial of causes was indefinitely postponed and great injustice resulted. In 1757, Lord Mansfield and the other judges took it upon them to remedy this state of affairs, and declared that they were clearly of the opinion that a view should not be granted unless the court were satisfied that it was proper and necessary. Accordingly the judges resolved that no view should be granted without a full examination into the propriety and necessity of it, unless the party applying would consent to such terms as might prevent an unfair use being made of it; and agreeably to this resolution they required a consent, that in case no view be had, or if a view be had by any of the jurors, though not six out of the first twelve, yet the trial shall proceed, and no objection shall be made on account thereof or for want of a proper return of the writ.[3]

Before the enactment of 4 Anne, ch. 16, it is to be noticed that the view was only granted in cases where a question of title was in issue;[4] but after the passage of that statute the rule was altered.[5] In criminal cases, until a recent date, there could be no view, except by consent.[6]

In carrying the view into execution, the courts were careful to guard against any abuses. A side bar order was entered, directed to the sheriff, commanding a view, the place and the day and hour of the meeting were designated in the order; two "showers," one for each party, were appointed to show the place in question, but they were to hold no communication with the jurors further than pointing out the localities. The names and places of residence of the "showers" were designated in the order, no evidence of any sort was allowed to be given to the jury, and the order provided that the jury should be refreshed at the equal charge of both parties.[7]

II. *In America.* (a.) *Basis of Authority*

[1] F. N. B. 178.
[2] Jacob's Dicty., Title "View."
[3] 1 Burrows, 253.
[4] Kempstet v. Deacon, 2 Salk. 665.
[5] Flint v. Hill, 11 East, 184.
[6] Rex v. Redman, 1 Keny. 384.
[7] Stones v. Menham, 2 Exch. R. 382

to Order View.—In this country, it would have been thought that the statute of Anne, formed a part of the common law, but the Illinois appellate court seem to hold that a view can be ordered over the objection of a party to the suit only where statutory authority is conferred. [8] They rely upon a Louisiana case [9] to support their view, but that case can scarcely be regarded as in point. It was a criminal case; and, as we have already seen, both before and after the statute of Anne, there could be no view in a criminal case, except of consent. In addition the Supreme Court of Louisiana based its decision as upon a violation of the accused's constitutional right to be confronted by the witnesses against him. In many of the American States, however, statutes have been enacted providing for the view in both civil and criminal cases.[10] In Pennsylvania, the statute provides for a view by the six out of the first twelve of the jurors on the panel, the statute of Anne having very evidently been followed. In all the other States the custom is to have the view by the trial jury after it has been impanelled.

(*b.*) *When Granted—Discretion of Court.*—Under the statutes, the rule of Lord Mansfield under the statute of Anne, has been adopted in both civil and criminal cases with unvarying uniformity, and a view will only be allowed, when in the sound discretion of the court it appears to be necessary and proper.[11] From the enactments of the greater number of the States, it would appear from the absence of any restricting words that the court has power of its own motion to order the view. In a few of the States, however, the rule would appear to be otherwise. Thus, in Massachusetts, New Hampshire, South Carolina, Virginia, West Virginia and Wisconsin, the authority to order the view would appear to be confined to cases where it is asked by either party,[12] and in Indiana, in criminal cases, it can only be allowed "with consent of all the parties."[13]

(*c.*) *Purpose and Intent of the View.*—In civil actions, other than proceedings under the power of eminent domain, the courts uniformly hold that the purpose of the view is not to furnish evidence to the jury, but to enable them to understand and apply the evidence produced by the parties.[14] The language of the Supreme Court of Iowa, in Close v. Samm, has often been quoted with approval. Cole, J., who delivered the opinion of the court, after quoting the statute, says: "The question then arises as to the purpose and intent of this statute. It seems to us that it was to enable the jury, by the view of the premises or place to better understand and comprehend the testimony of the witnesses respecting the same, and thereby the more intelligently to apply the testimony to the issues on trial before them, and not to make them silent witnesses in the case, burdened with testimony unknown to both parties, and in respect to which no opportunity for cross-examination or correction of error, if any, could be afforded either party." An early decision of the Supreme Court of Indiana [15] would appear to support the contrary view. The court in that case held that where a view has been had it could not review the decision of the trial court on a motion for a new trial on the ground of the insufficiency of the evidence to sustain the verdict, because "although the bill of exceptions

[8] Doud v. Guthrie, 13 Bradw. 658.

[9] State v. Bertin, 24 La. Ann. 46.

[10] California, Code Civ. Proc. § 610; Indiana, Rev. Stat. 1881, §§ 538, 1827; Iowa, Code, § 2790; Kansas, Dassler's Comp. Laws, §§ 3805, 4806; Maine, Rev. Stat. 1883, ch. 82, § 82; ch. 134, § 23; Massachusetts, Pub. Stat., ch. 170, § 43; ch. 214, § 11; Michigan, How. Stat., §§ 7620, 9569; Minnesota, Gen. Stat. 1878, ch. 66, § 228; ch. 114, § 10; Nebraska, Code Civ. Proc. § 284; Crim. Code, § 479; New Hampshire, Gen' Laws, ch. 231, § 17; New Jersey Rev., p. 550, § 29; New York, Code Crim. Proc. § 1659; Ohio, Rev. Stat., §§ 5191, 7283; Pennsylvania, Brightly's Purd. Dig., p. 837, §§ 76, 78; Rhode Island, Rev. Stat., ch. 187, § 1; South Carolina, Rev. Stat., ch. 111, § 35; Virginia, Code, ch. 158, § 37; West Virginia, Rev. Stat., ch. 116, § 30; Wisconsin, Rev. Stat., §§ 2852, 4694.

[11] Com. v. Knapp, 9 Pick. 515; Com. v. Webster, 5 Cush. 295; Clayton v. Chicago, I. & D. Ry. Co., 67 Iowa, 238; King v. Iowa Midland Ry. Co., 34 Iowa, 458; Kansas Cent. Ry. Co. v. Allen, 22 Kan. 285; Richmond v. Atkinson, 58 Mich. 413; Chute v. State, 19 Minn. 271; Smith v. St. Paul City Ry. Co., 32 Minn. 1; Snow v. Boston & Maine R. R., 6 Me. 230; Pick v. Rubicon Hydraulic Co., 27 Wis. 433; Boardman v. Westchester Fire Ins. Co., 54 Wis. 364.

[12] Pub. Stat. Mass., ch. 170, § 42; Gen. Laws N. H., ch. 231, § 17; Rev. Stat. S. C., ch. 111, § 35; Code Va., ch. 158, § 37; Rev. Stat. W. Va., ch. 116, § 30; Rev. Stat. Wis., § 2852.

[13] Rev. Stat. Ind., § 1827.

[14] Close v. Samm, 27 Iowa, 503; Parks v. Boston, 15 Pick. 209; Heady v. Vevay Turnpike Co., 52 Ind. 117; Jeffersonville, M. & I. R. R. Co. v. Bowen, 40 Ind. 545; Wright v. Carpenter, 49 Cal. 609; Brakken v. Minneapolis & St. L. Ry. Co., 29 Minn. 41; Washburn v. Milwaukee & L. W. Ry. Co., 58 Wis. 516.

[15] Evansville R. R. v. Cochran, 10 Ind. 560.

states that it contains all the evidence, yet in point of fact it shows it does not, for the reason that the jury were, as authorized by the statute, sent to examine the premises, and there is nothing in the record relative to such examination—that is, in regard to the information conveyed to their minds by such examination." In a later case,[16] however, the same court overruled that decision, and the current of authority upon the point would appear to be uniform, notwithstanding the language of Mr. Wharton,[17] from which it might be inferred that the jury may use the result of their own observation as primary evidence.

(*d.*) *In what Civil Cases the View may be Granted.*—In regard to the particular cases in which the view is authorized, while the language of the statutes varies, the difference is not sufficient to cause any great diversity in practice. The statutes are all conceived in very broad terms. The most common enactment is that the jury may have a view of "the property which is the subject of litigation or of the place in which any material fact occurred." The statutes of California, Indiana, Iowa, Kansas, Minnesota, Nebraska and Ohio are substantially in these terms. In Massachusetts, Michigan, Wisconsin, South Carolina, Virginia and West Virginia, the statutes allow a view of "the place or premises in question, or any property, matter, or thing relating to the controversy between the parties." In Maine, the provision simply is that "in a jury trial the presiding justice may order a view by the jury," while in New Hampshire the right is granted "in the trial of actions involving questions of right to real estate, or in which the examination of places or objects may aid the jury in understanding the testimony." It will be seen at once that the language of the statute is broad enough to permit a view in the vast majority of actions—so broad, indeed, that objection to the granting of the view seems seldom to have been taken.[18] The question whether, under the Minnesota statute, a view, not of the actual place or thing which relates to the matter in controversy, but of experiments with similar objects under similar circumstances, is authorized, has been decided by the supreme court of that State in the negative.[19] As far as the statutory provision is concerned, this would appear to be strictly correct, for the view authorized is of "the property which is the subject of litigation, or of the place in which any material fact occurred," or of "the place or premises in question, or any property matter or thing relating to the controversy." It would appear, therefore, that the statute only authorizes a view of places in some way connected with the cause of action, or of property or things in existence when the cause of action arose, or in some way connected with it. It is to be noted, however, that the Supreme Court of Iowa, in a case which they decided upon other grounds, evinced a very strong leaning towards the opinion that the jury might, at least by consent of parties, view experiments as a competent method of ariving at a fact.[20]

(*e.*) *View in Equitable Actions.*—In equity, the verdict of the jury being merely advisory, there can be very little occasion for any view. That a view may be granted under the statutes there would appear to be no doubt, as the terms are sufficiently broad to cover an action either in law or in equity. In one case[21] the trial court, apparently under the belief that the action was at law, allowed a jury trial and sent the jury to view the premises. On appeal, the supreme court held that the action was in equity, and, reasoning that the trial judge not having participated in the view could not have the whole evidence before him, and, therefore, could not review the jury's findings of fact, reversed his decision. While, as the court suggested as matter of practice, a view ought not to be allowed in actions in equity, except the judge accompany the jury, the accuracy of this decision must be questioned. The point is the same as that passed upon by the Indiana court when it held that, on appeal, when the bill of exceptions stated that it contained the whole evidence, the appellate court would consider an objection that the verdict was

[16] Jeffersonville, M. & I. R. R. Co. v. Bowen, 40 Ind. 545.

[17] Wharton's Law of Ev. (2d ed.), § 346.

[18] In Boardman v. Westchester Fire Ins. Co., 54 Wis. 364—almost the only case in which the question was raised—the court held that the Wisconsin statute to allow a view of the premises insured in an action to recover on a policy against loss by fire.

[19] Smith v. St. Paul City Ry. Co., 32 Minn. 1.

[20] Stockwell v. C. C. & D. R. Co., 43 Iowa, 470.

[21] Fraedrich v. Flieth, 64 Wis. 184.

against the evidence notwithstanding the fact that a view had been had.[22]

(*f.*) *View in Proceedings Under Power of Eminent Domain.*—In some States, the statutes provide for a special jury in cases involving the condemnation of lands. Thus, under the Michigan statute, the functions of the jury are in the nature of those exercised by assessors rather than of a jury in ordinary actions. Although the judge is allowed to "attend said jury to decide questions of law and administer oaths to witnesses," the statute also authorizes the appointment of a commissioner for that purpose, and even permits the jury to proceed without either.[23] In Louisiana, also, the jury impanelled for the condemnation of lands is peculiar. It must be composed exclusively of freeholders, and the members who compose it are evidently supposed and intended by the legislature to have a personal knowledge of the value of real estate in the vicinage, which entitles them to rely upon their own opinion in forming their judgment; although, doubtless, it is proper that their own opinion should be aided, especially if they request it, by the opinions of witnesses. Such a jury are, in truth experts; and the court suggest that in every such case a view is proper.[24] Under these statutes it is obvious that the purpose of the view is to furnish the jury with evidence, and a similar rule would appear to be followed in Massachusetts[25] and Kentucky.[26] In Wisconsin, it is held that the jury may resort to their own knowledge of the premises obtained from a view thereof, and to their general knowledge of the elements which affect the assessment, in order to determine the relative weight of conflicting testimony as to value and damages, but their assessment must be supported by the testimony or it cannot stand.[27] In Minnesota and Indiana, where there are no statutes specially requiring a view in cases of eminent domain, and the view is ordered under the general statute relative to civil actions, the courts hold that the jury cannot treat the results of the view as evidence, the view being allowed simply for the purpose of enabling them better to understand and apply the evidence.[28]

(*g.*) *View in Criminal Cases.*—As has already been remarked, at common law a view could not be allowed except by consent of parties. In many of the States it is now authorized by statute. Under the constitutional right of the accused to be confronted with the witnesses against him, the view can only be had in presence of the accused.[29] In regard to the purpose of the view, the Supreme Court of Minnesota hold that the view is granted merely to enable the jury to understand and apply the evidence, not to furnish evidence upon which a verdict may be found.[30] This, as we have already seen, is the rule in civil actions, and there seems to be no reason to doubt that it will be generally followed in criminal prosecutions. In Texas, where there is no statute authorizing a view in criminal cases, the granting of a view is reversible error, even where the defendant has consented.[31]

(*h.*) *Conduct of the View.*—The particular stage of the proceedings at which the view may be ordered is in the discretion of the court.[32] In one case the view was allowed, even after the judge had summed up.[33] The order directing the view to be had ought to specify the place to be inspected and should designate some person who knows it to point it out.[34] The jury must, during the view, be attended by the proper officer,[35] and he must be sworn.[36] Nothing in the nature of evidence is to be given during the view, either by the person appointed to show the premises or by any other person.[37] The requirement

[22] Jeffersonville, M. & I. R. R. Co. v. Bowen, 40 Ind. 545.

[23] How. Stat. Mich., § 3336; Toledo, A. A. & G. F. Ry. v. Dunlap, 47 Mich. 456; Michigan Air Line Ry. v. Barnes, 44 Mich. 222.

[24] Remy v. Municipality, 12 La. Ann. 500.

[25] Parks v. Boston, 15 Pick. 209.

[26] Harper v. Lexington & O. R. R. Co., 2 Dana, 227.

[27] Washburn v. Milwaukee & L. W. R. R. Co., 59 Wis. 364.

[28] Brakken v. Minneapolis & St. L. Ry. Co., 29 Minn. 41; Jeffersonville, M. & I. R. R. Co. v. Bowen, 40 Ind. 545; Heady v. Vevay Turnpike Co., 52 Ind. 119.

[29] Whart. Crim. Ev., §§ 312, 797; Whart. Crim. Pl. & Pr., § 707; State v. Bertin, 24 La. Ann. 46; Benton v. State, 30 Ark. 328; Carroll v. State, 5 Neb. 1; People v. Bush (Cal.), 10 Pac. Rep. 169, overruling People v. Bonney, 19 Cal. 427. But see to the contrary, State v. Adams, 20 Kan. 311.

[30] Chute v. State, 19 Minn. 271.

[31] Smith v. State, 42 Tex. 444.

[32] Galena & S. W. R. R. Co. v. Haslam, 73 Ill. 494.

[33] Reg. v. Martin, L. R. 1 C. C. 378.

[34] State v. Lopez, 15 Nev. 407.

[35] Patchin v. Brooklyn, 2 Wend. 377.

[36] People v. Queen, 53 Cal. 60.

[37] People v. Queen, 53 Cal. 60; State v. Lopez, 15 Nev. 407; Hayward v. Knapp, 22 Minn. 5.

that the jury shall be kept in a body is sufficiently complied with, if the wagons in which the jury are transported are at all times in sight of each other and if, during an intervening night, the jury occupied rooms at a hotel to which others could not obtain access.[38] Where defendant on the return journey rode in the same sleigh with the jury, the plaintiff will not be allowed to object afterwards if, by an objection at the time, he might have prevented the defendant's action,[39] and it would appear that in order to support an objection that the jury had been refreshed at the expense of one of the parties, the opposite party must show corruption or prejudice.[40] Where, between the date of the occurrence out of which the action arises and the trial, a change has taken place in the premises, evidence thereof may be admitted,[41] and in criminal cases the prosecution must satisfy the court that the prisoner has not been injured thereby.[42]

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[38] People v. Bush (Cal.), 10 Pac. Rep. 169.
[39] Hahn v. Miller, 60 Iowa, 96.
[40] Tripp v. Comrs. of Bristol, 2 Allen, 556; Coleman v. Moody, 4 Hen. & Mun. 1; Patton v. Hughesdale Mnfg. Co., 11 R. I. 188; Johnson v. Greim, 17 Neb. 447.
[41] Morton v. Smith, 48 Wis. 265.
[42] State v. Knapp, 45 N. H. 148.

NUISANCE — ALIENATION — DEATH — SUCCESSIVE ACTION — HEIRS — NOTICE — ABATEMENT.

SLOGGY V. DILWORTH.

Supreme Court of Minnesota, February 10, 1888.

1. *Nuisance — Alienation — Death — Successive Action.*—One who maintains a nuisance on his land which injures the property of others is liable in damages therefore. He cannot escape that liability by conveying the land to other persons. For the continuance of such a nuisance successive actions may be maintained by the parties injured. His grantee is also liable for such continuance after their title has accrued, but if the original wrong-doer shall die the cause of action abates and suit cannot be maintained against his legal representatives.

2. *Heirs—Notice to Abate.*—If a nuisance continues after the death of the owner of the offending premises, the heir who inherits the property will become liable for a nuisance, in an new action after he has received notice to abate the nuisance and has neglected to do so.

3. *Liability of Several for a Nuisance — When Jointly Liable and When Each is Liable for His Own Proportion of the Damage.*—Where a nuisance is created by the acts of several parties, if they have acted jointly, they are jointly liable; if they have acted independently in causing the nuisance, each is liable for his own proportion of the damages.

This action is brought by Jennie Sloggy against the executors of Joseph Dilworth, to recover damages resulting to crops upon her land in the year 1885, caused by the overflow of water in ditches dug by defendants' testator.

VANDERBURGH, J., delivered the opinion of the court:

In the year 1883 Joseph Dilworth, defendant's testator, owned sections 1 and 35, mentioned in the complaint, and one C. P. Sloggy, the husband of plaintiff, owned the northwest quarter of section 2, lying next adjoining on the south, to the southwest quarter of section 35, and west of section 1, the northeast quarter of section 2 intervening. The line between sections 2 and 35 is the boundary line between the towns of Moorhead and Oakport. During the same year Dilworth caused to be constructed the ditches and embankment described in the complaint on the boundary lines between sections 1 and 2, and 2 and 35. Such embankments constituted and were intended for a road-bed or highway, with ditches on each side,—the ditches between sections 1 and 2 running north into the east and west ditches, which ran along the north line of Sloggy's land, and beyond, into a large drain which extends to the river. Sloggy had notice at the time of the construction of these ditches; and the next year transferred the land in question to the plaintiff, his wife, and has since acted as her agent in the management of it. In January, 1885, Joseph Dilworth, who was a non-resident, died, and in March following his will was admitted to probate at Pittsburgh, in the State of Pennsylvania, and the defendants duly qualified as executors. This action is brought to recover damages resulting from the destruction of plaintiff's crop upon her land in the year 1885, alleged to have been caused by the overflow of the surface water gathered into the ditches dug by defendant's testator, as above described. No other or further acts of the deceased or his representatives are complained of than those above mentioned; that is to say, the ditches and embankments were made in 1883, and have since so remained. The action then is for consequential and special damage from flowage in 1885, and not for trespass and direct injuries to the premises then owned by plaintiff's husband in 1883.

1. Whether the latter licensed the excavation and embankment upon his own land we think was a question for the jury, and was determined by their verdict.

2. The verdict also determined that the effect of the ditches was to turn the water gathered from the low lands lying east of plaintiff's premises upon her land in unnatural quantities, to her damage, and resulting in the injury to her crops complained of.

3. The rule as laid down in Dorman v. Ames, 12 Minn. 452 (Gil. 347), and supported by the great weight of authority, is that the original of a nuisance remains liable to successive actions for damages resulting from the maintenance thereof. Plumer v. Harper, 14 Am. Dec. 336, 338; Prentiss v. Wood, 132 Mass. 488; McDonough v. Gilman, 3 Allen, 264; Pillsbury v. Moore, 44 Me. 154; Eastman v. Company, 44 N. H. 144.

4. He who erects a nuisance is liable for the damages arising from the erection, and also for the continuance thereof. The erection may of itself cause no injury, though an action may be proper in order to assert a right or prevent a threatened injury. But special damage may subsequently arise from its continuance, and so, while but one action can be maintained for its erection, repeated actions may be brought for its continuance. Staple v. Spring, 10 Mass. 74. And the originator is deemed to uphold and maintain it (as well as those claiming under him) while it is suffered to be continued, and is accordingly liable for damages, and he cannot release himself from his duty to remove it by his voluntary deed; but this liability must cease with his death. A cause of action growing out of the erection or continuance of a nuisance in his life-time will, by virtue of the statute, survive against his legal representatives, but not for the maintenance thereof subsequent to his death. Here the *gravamen* of the action is for the continuance of these ditches after Dilworth's death, and during plaintiff's occupancy. She sues for the special damages caused by the flowage complained of. She does not claim damages for the erection of the alleged nuisance, or for the direct injury to the freehold. The cause of action for which this suit was brought did not arise until the actual damage in question occurred, and the statute of limitations commenced to run from that time, and not earlier. 2 Greenl. Ev. § 433; Canal Co. v. Wright, 21 N. J. L. 469; Gould, Wat. §§ 412, 414. Every continuance of the nuisance or recurrence of the injury is an additional nuisance, forming in itself the subject-matter of a new action. Duryea v. Mayor, 26 Hun, 122. And it cannot be presumed that a nuisance will be continued, or the injuries repeated. Dorman v. Ames, *supra*, 455; Gould, Wat. § 420. Had Dilworth lived, he might not only not have continued, but might have removed the cause of the injury complained of.

5. The cause of action in this case, then, clearly arose after the death of Joseph Dilworth, and his representatives are not liable in this action by reason of any act of their testator. The plaintiff, however, in her complaint rests her claim upon the acts of the deceased; and there is no allegation or proof that the defendant's personal representatives had taken possession, or that they were cognizant of the condition of the premises, or the danger likely to arise from the continuance of the ditches, or in any way authorized or connected themselves therewith. They are not, therefore, liable. Oakham v. Holbrook, 11 Cush. 302. On the death of the ancestor the right of possession of the realty is in the heir or devisee until the personal representatives assert their right and take possession by virtue of the statute. Noon v. Finnegan, 29 Minn. 419, 13 N. W. Rep. 197. And the heir or other person succeeding to the possession could only be made liable after notice and request to abate a nuisance existing on the premises, unless, with knowledge of its character, he has actively interfered or contributed to injuries resulting therefrom. 1 Add. Torts, *60; Ang. Water-courses, § 403; Plumer v. Harper, *supra*, 338; Thornton v. Smith, 11 Minn. 15 (Gil. 1). It was only by virtue of the statute (Gen. Stat. 1878, ch. 77, § 1) that an action for such damages occurring in the life-time of the ancestor survived against his legal representatives. Upon his death, plaintiff was obliged to resort to the proper notice, or a suit to abate or restrain the continuance of the alleged nuisance, or such other proceedings as she might be advised, to prevent a threatened injury. He was liable to plaintiff's grantor for any damages arising from the trespass and the construction and maintenance of the ditches, including permanent injuries, until the transfer of the land by the latter. And upon the conveyance thereof to plaintiff, Dilworth became liable to her only for the damage done by the continuance thereof by him, to the time of his death, as he cannot be said to have continued them thereafter. Eastman v. Company, 44 N. H. 144; Gould, Wat. § 385. Otherwise, since repeated action may be brought for recurring injuries arising from the continuance of a nuisance, and the statute of limitations does not cut them off unless a prescriptive right has attached (Prentiss v. Wood, *supra*), such actions might be maintained successively for the same cause against both the heir and the executors. In Bridge Co. v. Lewis, 63 Barb. 111, cited by plaintiff's counsel, the action was for damages done in the life-time of the testator, and for tolls received for nine years before his death, or by the company of which he was a stockholder, and the liability might have been extended against his executors for the receipt of tolls after his death. The case, we think, is not in conflict with the views we have expressed.

6. The defendants—foreign executors—voluntarily appeared, and agreed to litigate this action as defendants, in order to determine the question of their liability as personal representatives of the deceased. The stipulation for this purpose is somewhat ambigous, but it is obvious that its object was simply to consent to come in as defendants, and litigate the case upon the merits, without any proceedings in the probate court here to establish the will, or for the appointment of executors in this State, both as respects the legal liability of the deceased, or themselves as his executors, upon the alleged cause of action set forth in the complaint. Upon the case as presented it is clear, we think, that the plaintiff failed to establish such liability.

7. It appears that only a part of the surface

water which caused the damage complained of came from the land naturally drained by the ditches constructed by the deceased, but that, after his death, other persons, of their own motion, opened a connection with the ditch on the west side of section 1, opening into a slough lying east of that section which had filled up with water in consequence of heavy rains, and thereby the flow of water in the Dilworth ditches was so much increased as to cause the flooding of plaintiff's land to the extent complained of. Upon these facts the defendants, if liable at all in the action, would not be liable for the proper proportion of the damages caused by them. If waters are wrongfully turned upon the land of another as the result of the acts of several parties, they are all liable. It is no defense that the injury caused or wrong done by any one standing alone might not be a sufficient ground of complaint. If the damage caused is the combined result of several acting independantly, recovery may be had severally in proportion to the contribution of each to the nuisance, and not otherwise. 1 Add. Torts, *364; Gould Water-courses, §§ 222, 278, 398; Sellick v. Hall, 47 Conn. 260; Brown v. McAllister, 39 Cal. 573; Chipman v. Palmer, 77 N. Y. 51. If, however, they are acting jointly in the premises, then they may be jointly or severally sued for the entire damage. So, if the defendants had agreed, consented to, or acquiesced in the joint use of these ditches as a common outlet for the drainage of their own and the lands lying east and beyond, the rule adopted by the court making them liable for the entire damages sustained by the plaintiff might have been sustained; but, as applied to the facts in this case, it was erroneous. Order reversed.

NOTE.—Every continuance of a nuisance makes a fresh one.[1] It is well settled that one recovery does not bar subsequent actions where a nuisance is continued or repeated.[2] Ordinarily, such damage only may be recovered as has been suffered up to the time of the commencement of the action.[3] But where the wrong consists of a single act of destruction, it is settled in a few States at least, that the cause of action is complete, and that the party injured must have full compensation in the first suit, not only for the act, but for all the consequences which may arise from it. Thus it has been laid down in Iowa, that where a nuisance will continue without change from any cause but human labor, the same is an original damage and may be at once fully compensated.[4] In one case, the city had so constructed a ditch that the water passing through it cut away the plaintiff's land; the court held that the damage was original, and that full compensation could be recovered in one action.[5] This is in line with decisions in New Hampshire, where it has been held that railway embankments and canal locks, dams and towing paths are nuisances of a parmanent nature, for which present and prospective damages may at once be recovered.[6] So the courts have decided in Massachusetts in similar cases.[7] The same doctrine has been upheld in Michigan, where the destruction of the front and other portions of a building, which resulted in injury to its tenant, was held to be a single and permanent wrong, which entitled him to damages up to the end of his tenancy.[8] And in Illinois, the courts have decided that all damages which will result from the construction and putting in operation of a railroad can be immediately estimated, and must be recovered in one action.[9] In one case it was held that where a suit is based upon the deterioration of the plaintiff's property through jarring, smoke or deposits of cinders and ashes, one recovery will be a bar to any further prosecution for the same cause, but if a recovery be had for the annoyance merely, it would seem that a similar recovery may be had at every term of court so long as the nuisance lasts.[10] We find, however, that while damages may be recovered is Missouri in a single action where the injury is of a permanent character, and goes to the entire value of the estate, separate actions must be brought when the wrong may be apportioned from time to time.[11]

In States where the rule prevails, it seems to be optional with the plaintiff whether he will sue for prospective damages or not, and that his election must be made evident in his declaration.[12] Where an indictable nuisance exists, there is a co-ordinate remedy in equity to abate it by injunction.[13] And it is furthermore true, that a court of chancery gives damages for permanent injury once for all.[14]

[1] 1 Chit. Pl. 76; 3 Black Com., 220.

[2] Hambleton v. Seere, 2 Saunders, 170; Rosewell v. Prior, 2 Salk. 460; Holmes v. Wilson, 10 A. & E. 503; Thompson v. Gibson, 7 Mees. & W. 456; Estey v. Baker, 48 Me. 495; Russell v. Brown, 63 *Id.* 203; Bare v. Hoffman, 79 Pa. St. 71; Harrington v. R. Co., 17 Minn. 215; Adams v. R. Co., 18 Minn. 260; Baldwin v. Calkins, 10 Wend. 178; Staple v. Spring, 10 Mass. 74; Waggoner v. Gremaine, 3 Denio, 306; Spelman v. Co., 74 N. C. 675; Cobb v. Smith, 38 Wis. 36; Author and Continuer of Nuisance, 1 Cent. L. J. 306.

[3] Uline v. N. Y. Central, etc. R. Co., 23 Am. & Eng. R. Cas. 3; Slight v. Gutzloff, 35 Wis. 695; Hopkins v. Western Pac. R. Co., 50 Cal. 190; The Savannah & Ogeechee Canal Co. v. Baurquin, 51 Ga. 328; Blunt v. McCormick, 3 Denio, 283; Way v. Cheshere R. Co., 23 N. H. 102; Hambleton v. Veere, 2 Saunders, 170; Rosewell v. Prior, 2 Salk. 460; C. & O. Canal Corp. v. Hetchings, 65 Me. 140; Wolf v. Kirkpatrick, 22 Cent. L. J. 516, annotated case.

[4] Finley v. Hershey, 41 Iowa, 398; Simpson v. Keokuk, 34 Iowa, 568; Van Pelt v. Davenport, 42 Iowa, 314; Cable v. Muscatine, etc. R. Co., 44 Iowa, 11; Bezer v. Ottumwa Hydraulic Power Co., 30 N. W. Rep. 495; Van Arsdal v. R. Co., 56 Iowa, 470.

[5] Power v. Council Bluffs, 45 Iowa, 655. See Woods' Limitations of Actions, 375, criticizing above.

[6] Way v. Cheshire R. Co., 23 N. H. 102; Woods v. Nashua Mfg. Co., 5 N. H. 467.

[7] Fawle v. New Haven & North Hampton Co., 107 Mass. 333; Fawle v. New Haven & North Hampton Co., 112 Mass. 337; Warner v. Bacon, 8 Gray, 397; Wheeler v. Worcester, 10 Allen, 591.

[8] Conlon v. McGraw, 8 West. Rep. 199.

[9] Chicago & Eastern Ill. R. Co. v. McAuley, 8 West. Rep. 457; Chicago & Eastern Ill. R. Co. v. Loeb, 5 West. Rep. 887; Ottawa Gas Light and Coke Co. v. Graham, 28 Ill. 73; The Chicago & Pacific R. Co. v. Stein *et al.*, 75 Ill. 42, where a railroad bridge was held to be a permanent injury to adjoining property.

[10] I. C. R. Co. v. Grabill, 50 Ill. 241; C. M. & St. P. R. Co. *et al.* v. Hill, 90 Ill. 42; Cooper v. Randall, 59 Ill. 317.

[11] Dickson v. Chicago, etc. R. Co., 10 Reporter, 248.

[12] 3 Suth. on Dam., 413-4; Cooper v. Randall, 59 Ill. 317.

[13] People v. Gold Run Ditch and Mining Co., 4 Pac. Rep. 1158.

[14] Mayne on Damages, 465; Watson v. Hunter, 5 Johns. Ch. 169; Jesus College v. Bloom, 3 Atk. 262; Smith v. Cooke, 3 Atk. 381; Bird v. The W. & M. R. Co., 8 Richard-

Notice to abate should ordinarily be served upon one who erects or maintains a nuisance before suit is brought for the recovery of damages.

In three cases it is not necessary:

1. Where there is a positive wrongful act.

2. Where the defendant has been grossly negligent.

3. Where there is imminent danger to life or health as a necessity for immediate action.[15]

Numerous decisions are also to be found which take the ground, that notice is likewise unnecessary where the defendant knew before the commencement of the action of the existence of the nuisance. Where the same was erected by other persons,[16] only a nuisance *per se* may be abated summarily by individuals or by the public, being such as affect the health or interfere with the safety of property or person, or are tangible obstructions in highways under circumstances presenting an emergency.[17] Whoever assumes to abate as a nuisance that which is not a nuisance, acts at his own risk and peril.[18] The fact that a plaintiff who files his petition to abate a mill pond, alleging that it is a nuisance, is a stockholder and director in the defendant corporation, cuts no figure as regards his right of action.[19]

Silent acquiescence upon the part of a plaintiff while a nuisance is being erected afterward will be no bar to his bringing a suit to have the same abated, no encouragement having been given the defendant sufficient to make it a fraud upon the part of the plaintiff to subsequently object.[20] A private person has no right to abate a public nuisance unless it obstructs his individual right.[21] An action to abate a nuisance caused by obstructing a ditch in which damages are claimed, and an injunction to prevent permanent and irreparable injury is prayed for, is an action in equity, and not an action at law to be tried by a jury. Where such an action has been erroneously submitted to a jury for trial, their verdict is merely advisory.[22] An injunction may be granted to restrain the owner of premises from allowing them to be put to a certain use, such as the sale of liquors, although such use of said premises has been abated as a nuisance.[23] Long user is no defense to an action seeking to enjoin the further continuance of a nuisance.[24] It seems, also, well settled that one who has erected a nuisance will be liable for its continuance after he has parted with the title and possession, especially when he has conveyed with covenants of warranty.[25] And furthermore, that a failure to prove damages as alleged does not prevent recovery of nominal damages.[26] All who jointly participate in the creation or maintenance of a nuisance, are jointly and severally liable in damages.[27] There must, however, be concert of action and cooperation to make several persons jointly liable.[28]

If several persons independently and without concert create a nuisance, they are not jointly liable, but each is liable only for his own act.[29] Thus, where a stream was obstructed by debris thrown into it from several mines owned by different parties, it was held that as the tort was several when committed, it could not become general because of the consequence of such acts.[30] But on the other hand, it has been held in California where several individuals divert the waters of a stream so as to cut off a portion of the supply to which another is entitled, without any partnership or concerted action on their part, that all who act must be held to act jointly, on the ground that without unity of action no wrong could be committed, and furthermore, that in such cases it is proper to apportion the costs and damages recovered equally among the defendants.[31] The decision in this case can hardly be said, therefore, to be contrary to the general rule.

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Swanson Eq. 46; Madison Ave. Baptist Church v. Baptist Church in Oliver St., 73 N. Y. 95.

15 Abatement of Nuisances, 19 Cent. L. J. 44, and cases there cited.

16 Wayland v. Kansas City, 14 Reporter, 179; Morse v. Borough of Fair Haven East, 14 Reporter, 76; Dickson v. Chicago, etc. R. Co., 10 Reporter, 247; Pinney v. Berry, 61 Mo. 359; Contractors S. R. v. B. N. Y., etc., 51 N. Y. 582; Brown v. Coyuga, etc. R. Co., 2 Kern, 486; Judge v. Kribs, 32 N. W. Rep. 324.

17 City of Denver v. Mullen, 3 Pac. Rep. 693; Reed v. Cheney, 12 N. E. Rep. 717.

18 Tessat and others v. Great Southern Telephone and Telegraph Co., 3 South. Rep. 261.

19 Leonard v. Spencer *et al.*, 15 N. E. Rep. 397.

20 Radenhurst v. Coate, 6 Grant Ch. 139; Leonard v. Spencer, 15 N. E. Rep. 399; Corley v. Lancaster, 1 Ky. L. Rep. & Jour. 39; Pennsylvania Lead Co's Appeal, 11 Reporter, 246; Central R. Co. v. English, 73 Ga. 366.

21 Goodsell v. Flemming, 17 N. W. Rep. 679; Ostie v. Kelley, 23 N. W. Rep. 863.

22 Fraedrich v. Fliette, 25 N. W. Rep. 28.

23 Judge v. Kribs, 32 N. W. Rep. 324.

24 Seifried v. Hays, 5 Ky. L. Rep. 369.

25 Lohmiller v. Indian Hood Water Power Co., 11 Reporter, 792.

26 Humphrey v. Irvin, 6 Atl. Rep 479; Ware v. Allen, 5 N. E. Rep. 629; Weiss v. Oregon Iron & Steel Co., 11 Pac. Rep. 255; Coil v. Sheboygan, etc. R. Co., 1 N. W. Rep. 295; Postorious v. Fisher, 1 Rawle, 24; Caseceer v. Mocory, 55 Pa. St. 49.

27 Cooley on Torts, 133-4.

28 Chipman v. Palmer, 77 N. Y. 51; Williams v. Sheldon, 10 Wend. 654; Wallace v. Drew, 59 Barb. 413; Wood v. Sutcliffe, 8 Eng. L. & Eq. 217; Seeley v. Alden, 61 Penn. 302; Bard v. Yahn, 26 Penn. 482; Sellick v. Hall, 47 Conn. 260.

29 3 Suth. on Dam., 425.

30 Little Schuylkill, etc. Co. v. Richards' Admr., 57 Pa. St. 142; Sellick v. Hall, 47 Conn. 260; Chicago, etc. R. Co. v. ——, 90 Ill. 339; Cobb v. Smith, 38 Wis. 21.

31 Hillman v. Newington, 57 Cal. 54.

CORPORATIONS—CONTRACTS—MORTGAGES—AUTHORITY OF AGENT—ESTOPPEL.

FITCH V. LEWISTON STEAM MILL CO.

Supreme Judicial Court of Maine, January 9, 1888.

1. The certificate of a magistrate, appended to a mortgage given by a corporation, that "James Wood, treasurer," personally appeared "and acknowledged the above instrument to be his free act and deed," is sufficient to establish the validity of the mortgage as a corporate act.

2. Where a corporation raises money on a mortgage executed by one of its agents on its behalf, and retains and uses such money for eight years, it is estopped thereby from denying the authority of the agent to make the mortgage.

FOSTER, J., delivered the opinion of the court:

The only question to be determined is, whether the plaintiff is entitled to prevail in this action, which is a writ of entry upon a mortgage alleged to have been given to Jonas F tch, plaintiff's testatrix, by the defendant cor ration. Two objections are interposed F hat the mortga

is defective in form; second, that it was given without the authority of the corporation.

1. The defect relied upon relates wholly to the acknowledgment of the instrument. The mortgage itself is free from any objection in form It purports to be executed as the deed of the corporation by its treasurer duly authorized. It names the corporation as the party making it. Upon its face it is the contract of the defendant corporation. But it is contended by the counsel for the defense that the acknowledgment is not for or in behalf of the corporation, but it is the acknowledgment of the treasurer in his individual capacity. By the certificate of the magistrate it appears that "James Wood, treasurer," personally appearing "and acknowledged the above instrument to be his free act and deed." It needs no discussion to show that the mortgage, in every other respect complete and formal, is not vitiated by this informality in the certificate of acknowledgment. As between the parties, a deed is valid though not acknowledged. It will pass the title to the estate in such case as against the grantor and his heirs. Lawry v. Williams, 13 Me. 281; Buck v. Babcock, 36 Me. 493; Poor v. Larrabee, 58 Me. 559. Such an acknowledgment as this, however, has been sustained by other courts. Thus, in Tenney v. Lumber Co., 43 N. H. 343, the same objection was raised as in the present case, and the court there held that the acknowledgment was sufficient, and that "this objection has no reasonable foundation."

2. That it was given without authority of the corporation. The equities in this case are by no means in favor of the defendant corporation. The mortgage was executed in behalf of the corporation by one who was, and for a long time had been, its treasurer and general business manager. The money obtained upon this mortgage, $13,-551.76, was received and retained by the corporation. It is in evidence that the treasurer and general manager of this concern had been in the habit of deeding and conveying land with the corporation's name, for corporation purposes, and for the corporation's benefit, and that this was one of those transactions. It appears also, that at the time of this conveyance the treasurer exhibited a vote of the corporation to Fitch, the mortgagee, and informed him that he had authority, by virtue of such vote passed at the organization of the company, to execute this mortgage as security for the money obtained from him. That vote is as follows: "Voted that the treasurer be hereby authorized and empowered to make, sell, execute and deliver, in the name of the company, any and all conveyances of land by deed or bond or otherwise, and all the papers of the company not otherwise provided for in the by-laws." The corporation has retained the money thus obtained, paying interest thereon to the mortgagee from year to year with checks drawn by the treasurer of the corporation upon its funds. There is no good reason why this mortgage should not be upheld, if it can be done consistently with the rules of law. Let us pass, then, for a moment to the consideration of these rules, so far as may be proper in their application to this case. It is a well settled principle applicable to corporations that they have the power to sell their property, real and personal, and to mortgage it for the security of their debts. This is incident to the power of acquiring and holding it. Pierce v. Emery, 32 N. H. 503; 1 Jones, Mort. § 124; Angell & A. Corp. § 107; Richards v. Railroad, 44 N. H. 135. This is a right existing by common law, but of course may be limited by statute or by the acts under which they are organized. No charter or by-law has been introduced limiting the general power of this corporation. This power, unlike that applicable to natural persons, is in general executed only through some agent of the corporation whose authority is derived in some manner therefrom, or, if not authorized, whose acts may be subsequently ratified by the corporation. And in matters where the acts of the agent of a corporation, in the transfer of personal property, require no formal instrument under seal, as in the sale or mortgage of personal property, it is not necessary that the authority should be given by a formal vote. In this State, as well as in many others, it is held that the same presumptions are applicable to corporations as to individuals, and that a deed, vote or by-law is not necessary to establish a contract, promise or agency. Stage Co. v. Longler, 14 Me. 449; Trundy v. Farrar, 32 Me. 228. "Authority in the agent of a corporation may be inferred from the conduct of its officers, or from their knowledge and neglect to make objection, as well as in the case of individuals.' Sherman v. Fitch, 98 Mass. 64; Badger v. Bank, 26 Me. 428, 435; Goodwin v. Screw Co., 34 N. H. 378; Story, Ag. § 52. It is a general rule of law applicable to natural persons, that whenever the act of agency is required to be done in the name of the principal, under seal, the authority to do the act must be conferred by an instrument under seal. Such was formerly the doctrine in regard to the authority of agents of corporations. But in modern times this ancient rule has been wholly discarded in this country; and it is now well settled that an agent of a corporation may be appointed—certainly by vote—without the use of a seal, whatever may be the purpose of the agency. Bank v. Patterson, 7 Cranch, 299; Fleckner v. Bank, 8 Wheat. 338; Despatch Line Co. v. Manufacturing Co., 12 N. H. 231; Ang. & A. Corp. §§ 282, 283. The contention, therefore, that the mortgage in question was given without authority comes with an ill grace from the defendants, and, under the circumstances, must be deemed untenable. Here was the express authority of the corporation created and existing by vote duly recorded, authorizing and empowering its treasurer to make, sell, execute and deliver, in the name of the corporation, any and all conveyances of land by deed, bond or otherwise. This authority was broad enough to embrace the transaction in relation to this mortgage. The treasurer, not only in

this case, but on other occasions, had acted in like manner, relying on the authority conferred by this vote. The party who advanced the money and received the mortgage, was led to believe that the treasurer was acting under that authority. This is not denied. Consequently, after enjoying the benefit of the loan, and acquiescing in the transaction for more than eight years, it does not lie in the mouth of the defendant corporation to say that the mortgage is inoperative and void. Society v. Paddock, 80 Ill. 263. Judgment for plaintiff.

NOTE.—*Deeds of Corporations.*—There is no essential difference between the deeds of corporations and those of individuals, except such as arise from the fact that the signing, sealing and acknowledgment of deeds of companies must necessarily be done through an agent of the corporation by proxy, so to speak. The corporate agent authorized to affix the corporate seal, need not have been constituted such agent by a sealed instrument.[1] The mayor or other chief executive officer of a municipality is the one to execute a deed on its behalf, so the president or cashier of a bank should execute its deeds.[2]

Statutes may require deeds of railway companies to be signed by their president under the seal of the corporation.[3]

Where the deed is proved to have been signed by one who was an agent of the corporation at the time the corporate seal was attached, his authority to put on the seal is presumed until rebutted.[4]

The seal itself is *prima facie* evidence that it was put on by the authority of the corporation.[5] Sealing is the mode in which, at common law, corporations aggregate execute deeds.[6] Where the deed is not signed or the seal attested by an officer or agent of the corporation, or the signature of such officer or agent is not proved, the seal of the corporation must be proved.[7] It is usual to sign the name of the corporation,[8] but not absolutely necessary[9] except where required by statute, as it is in some States.[10] But at common law, the signature of a corporation is its corporate seal.[11]

Unless a particular form of seal be prescribed by statute for a corporation, it may adopt any device or form it chooses, *e. g.*, a wafer-like piece of paper.[12] If a company adopt a peculiar seal it may be proved to be theirs by any one familiar with it.[13] When a seal is proved to be that of a company, it will be presumed to have been properly affixed, and the burden will be on any one opposed to show that it was used without authority.[14] Conveyances purporting to be made on behalf of corporations by officers thereof, under their own seals and not that of the corporation, have been held not to be the deeds of the corporation.[15] A lease executed by the "trustees of the town of Chicago," without the corporate seal is void.[16] Where a deed signed "J. Schnierle, Mayor (L. S.)," was admitted in evidence without objection, it cannot be made the basis of a motion for a nonsuit on the ground that the corporate seal was not attached and proved.[17] Where a statute incorporates trustees of a gospel lot and gives "the said trustees" authority to sell the lot, they may execute a deed in their own name and not in the name of the corporation; although this would have been otherwise had the act been that the "corporation" shall have power to sell.[18] Conveyances of real estate should, in general, be executed in the corporate name and under the corporate seal.[19]

A mortgage was executed to the appellant by a corporation by T H, its attorney duly appointed for that purpose under the seal of the corporation. In the certificate of acknowledgment it is stated that "personally appeared T H, attorney for the Frostburg Lodge, No. 49, Independent Order of Odd Fellows, and acknowledged the foregoing mortgage to be his act and deed:" *Held*, that this acknowledgement was a substantial compliance with the provisions of the code.[20] In this case the court took the view, that in aid of the certificate the court would look at the whole instrument.[21] A deed in this form: "We, the E W L Co., in consideration of $5,000 to us paid," etc., "do give, grant," etc.; "we, the E W L Co., do hereby covenant," etc., "if the E W L Co. shall pay," etc., and concluding, "In witness whereof, we have hereunto set our hands and seals," etc., signed, "D E F, president," etc., and seal, "E S C, treasurer," etc., and seal, is the deed of the corporation if the agents were authorized to execute it. An acknowledgment on such deed in this form: "Personally appearing D E F and E S C, acknowledged the foregoing instrument to be their free act and deed, before me," etc., is sufficient to give it effect as the deed of the corporation.[22]

Where the granting clause of a deed from a city was as follows: "Now, therefore, I, Sylvester J. Kintz, city clerk of the city of Tiffin, by virtue of the powers

[1] Hopkins v. Gallatin T. Co., 4 Humph. (Tenn.) 403; Beckwith v. Windsor Mfg. Co., 14 Conn. 603; Burr v. McDonald, 3 Gratt. 215.

[2] Sheehan v. Davis, 17 Ohio St. 571.

[3] Ohio S. & C. 273, § 14; 279, § 32.

[4] Flint v. Clinton Co., 12 N. H. 430; Eyster v. Gaff, 2 Colo. 228; Blackshire v. Iowa Homestead Co., 39 Iowa, 624; Morris v. Keil, 20 Minn. 531.

[5] Sheehan v. Davis, 17 Ohio St. 571; Lovett v. Steam Saw Mill Assn., 6 Paige, 54; Ang. & Ames on Corp., § 224; 1 Kyd. on Corp., 268; 6 Serg. & R., 12.

[6] Sheehan v. Davis, 17 Ohio St. 580; 1 Bl. Com., 475; 1 Parsons Cont., 140, 141; 3 Sug. Vend., 353; Ang. & Ames Corp., ch. 7; 1 Kyd. on Corp., 268; 15 Wend. 258.

[7] Foster v. Shaw, 7 Serg. & R. 156; Jackson v. Pratt, 10 Johns. (N. Y.) 381; Den v. Fralandt, 2 Hals. (N. J.) 352; Morris v. Thompson, 8 T. R. 303; Bank of England v. Chambers, 4 Ad. & El. 412; Turnpike Co. v. McCullough, 25 Pa. St. 303.

[8] Ang. & Ames Corp., § 225; Flint v. Clinton Co., 12 N. H. 430, 433; Cooch v. Goodman, 2 Q. B. 580; Osborne v. Tunis, 1 Dutch. (N. J.) 633, 661.

[9] Cooch v. Goodman, 2 Q. B. 580; Osborne v. Tunis, 1 Dutch. (N. J.) 633, 661.

[10] Isham v. Bennington Iron Co., 19 Vt. 251.

[11] Doe v. Hogg, 4 Bos. & P. 306; Gordon v. Preston, 1 Watts, 385; Frankfort Bank v. Anderson, 3 A. K. Marsh, 932; Beckwith v. Windsor Mfg. Co., 14 Conn. 594.

[12] Mill Dam Fdy. v. Hovey, 21 Pick. 417; Tenney v. Lumber Co., 43 N. H. 354; Porter v. A. & H. R. Co., 37 Me. 357; Com. Dig. Fait, A, 2; Bank of Middlebury v. R. & W. R. Co., 30 Vt. 159; Davis v. Brown, Belk. 1859; South Baptist Soc. v. Clapp, 18 Barb. 59; Reynolds v. Trustees, 6 Dana, 37.

[13] Moses v. Thornton, 8 D. & E. 303; Chadwick v. Bunning, R. & M. 306; Anon, 12 Mod. 423; Lisure v. Vegas, 7 S. & R. 313; Jackson v. Pratt, 10 Johns. 381.

[14] Reed v. Bradley, 17 Ill. 321; Brunker v. Atkins, Skin. 2; Hoyt v. Thompson, 1 Seld. 335.

[15] Bradley v. Mann, 2 Cush. 338; Hatch v. Barr, 1 Ohio, 390. See also Isham v. Bennington Iron Co., 19 Vt. 230.

[16] Kinzie v. Trustees, 1 Scam. (Ill.) 187.

[17] City Council v. Moorehead, 2 Rich. (S. C.) 567.

[18] De Zeng v. Beckman, 2 Hill, 489.

[19] Dill. Mun. Corp., § 578.

[20] Frostburg, etc. Assn. v. Brace, 51 Md. 508.

[21] Kelly v. Rosenstock, 45 Md. 389.

[22] Tenney v. East Warren Lumber Co., 43 N. H.

in me vested by said ordinance, and in pursuance thereof do hereby give, grant, bargain, sell and convey unto the said Rezin W. Shawhan, his heirs and assigns forever, the lands and tenements described as follows," etc., and the signature was as follows: "Sylvester J. Kintz, city clerk, city of Tiffin," and the seal was Kintz's own private scroll seal, and the seal of the "city clerk of Tiffin, Ohio," the deed was held invalid because not properly sealed, and not made by the proper city officer (the mayor) even though the city council had passed an ordinance authorizing the city clerk to execute it.[23]

Where a deed purporting to convey title to land by a national bank, to which was signed the corporate name, with the bank seal affixed by "John Kerr, president," and "R. P. Aunspaugh, cashier," had affixed thereto the following certificate of acknowledgment: "This day personally appeared John Kerr, president of said First National Bank of the city of Dallas, and R. P. Aunspaugh, cashier of said bank, both of whom are to me well known, and severally acknowledged that they executed the above and foregoing instrument for the purposes and considerations therein contained" (signed by the officer and authenticated with his seal): *Held*, that the acknowledgment was a sufficient compliance with the statute requiring the president of a corporation in making a deed to acknowledge it to be "the act of the corporation."[24] The court in thus deciding, said: "All that has ever been required, with reference to the ordinary acknowledgment of a deed, is a substantial compliance with the statute. As was truly said in Monroe v. Arledge,[25] the material matter to be embraced in the acknowledgment is the execution of the deed. While the statute provides that the officer is to acknowledge the deed as the act of the corporation, and the officer does not, in express terms, declare that it was the act of the corporation and so acknowledged, still, that was the effect of the acknowledgment. The deed purports to be the act of the corporation, executed by Kerr as president, and he acknowledged that it was executed for the purposes and considerations therein contained. This acknowledgment was in substantial compliance with the statute. In our opinion, there was no error in the admission of the deed in evidence.[26]

In Eppright v. Nickerson,[27] to an assignment for the benefit of creditors executed by a corporation, was appended a notary's certificate that M C, president, and A M, cashier of the company, "acknowledged that they executed and delivered the same as their voluntary act and deed for the uses and purposes therein contained:" *Held*, that this was a sufficient certificate, and that the corporation acknowledged the instrument. Judge Hough and Judge Henry both dissented from the soundness of this decision, but concurred in the judgment since they were required to follow the precedent of Kansas City v. Han. & St. Joe R. Co.[28] In that case the granting clause was: "Know all men by these presents, that the Western Kansas Land Company, by Soloman Houck, president, and Theodore S. Case, secretary, * * * has granted * * *. In witness whereof, we hereunto subscribe our names and affix our seals, etc.

Soloman Houck, president. [SEAL.]
Theodore S. Case, secretary. [SEAL.]
W. K. Land Company. [SEAL.]"

[23] City of Tiffin v. Shawhan, 9 Am. & Eng. Corp. Cas. 561.

[24] Muller v. Boone, 63 Tex. 91, following Monroe v. Arledge, 23 Tex. 480.

[25] 23 Tex. 480.

[26] Muller v. Boone, 63 Tex. 93.

The certificate of acknowledgment was, that Houck and Case "acknowledged that they executed and delivered the same as their voluntary act and deed for the purposes therein mentioned." This was held to be the deed of the company and the acknowledgment sufficient.

The apposition of the corporate seal to its conveyance gives the deed validity without the further formality of delivery.[29]

All deeds, including those of corporations, should be recorded.[30]

Statutes prescribing particular ways in which corporations may execute deeds, are construed as enabling acts which, while they point out one way by which corporate deeds may be executed, do not prohibit their execution by other methods of recognized validity at common law.[31]

ADELBERT HAMILTON.

[27] 78 Mo. 483.

[28] 77 Mo. 180.

[29] Willis v. Jermin, Cro. Eliz. 167; Cruise T., 32, ch. 2, § 82.

[30] Sheehan v. Davis, 17 Ohio St. 571.

[31] Bason v. King's Mountain Mining Co., 90 N. C. 417; Morris v. Keil, 20 Minn. 531.

WEEKLY DIGEST

Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.

1. ACCOUNT—Evidence.——The books of account of a merchant stating payments to him are not evidence of such payment in his own favor.—*Oberg v. Breen*, N. J. Ct. Err. & App., Feb. 2, 1888; 12 Atl. Rep. 203.

2. ACCOUNTS— Mutual — Limitations. —— When the only credits to a party in an account are his payments, and there was always a balance against him, the account is not mutual, and all claims therein accruing more than four years before suit brought are barred.—*Lark v. Cheatham*, S. C. Ga., March 3, 1888; 5 S. E. Rep. 290.

3. ACTION—Tenants in Common.——One of two joint owners of a chattel cannot maintain an action therefor without joining the other joint owner as plaintiff.—*Corcoran v. White*, S. J. C. Mass., March 3, 1888; 5 N. Eng. Rep. 891; 15 N. E. Rep. 636.

4. AGENT—Notice—Lien.——The fact that an attorney was allowed to loan money for a mortgagee will not make his knowledge of a prior unrecorded mortgage that of the mortgagee, when it is not shown that he was appointed agent of the mortgagee and he denies such appointment.—*Caughman v. Smith*, S. C. S. Car., March 14, 1888; 5 S. E. Rep. 362.

5. AGENT—Sale—Delegation. —— Authority to sell, given by the mortgagee to the mortgagor of personal property, involving judgment and discretion, cannot be delegated, though there may be an exception established by commercial custom.—*Drum v. Harrison*, S. C. Ala., Feb. 13, 1888; 3 South. Rep. 715.

6. APPEAL — Accepting Judgment. —— When judgment was given for plaintiff, but requiring him to pay money into court, which he did, and which money defendant accepted: *Held*, that defendant could not appeal from the judgment.—*Webster, etc. Co. v St. Croix Co.*, S. C. Wis., March 27, 1888; 36 N. W. Rep. 864.

7. APPEAL — Amended Assignment of Errors.—— Amended assignment of errors may, on motion, be filed in this court within ten days prior to the first day of the trial term.—*Stanley v. Barringer*, S. C. Iowa, March 8, 1888; 36 N. W. Rep. 877.

8. APPEAL—General Exceptions. —— Exceptions to instructions taken *en masse* are too general to be considered on appeal.—*Stevenson v. Moody*, S. C. Ala., Feb. 15, 1888; 3 South. Rep. 695.

9. APPEAL—Jurisdictional Amount.——When a case involves $2,000, but by amendment involves less than $2,000, it is not appealable.—*Martine v. Hopkins*, S. C. La., March 5, 1888; 3 South. Rep. 734.

10. APPEAL—Rehearing.—— A rehearing on appeal will not be granted, though the opinion erroneously states that the question of waiver was for the jury, to whom it was properly submitted, if, in reality, no such question arose on the trial to be submitted to the jury.—*Cobbs v. Fire A. of Philadelphia*, S. C. Mich., March 2, 1888; 36 N. W. Rep. 788.

11. APPEAL—Review— Discretion. —— A motion for reargument of an appeal is not reviewable. The argument and reargument of an appeal are matters of discretion with the court in which the appeal is pending.—*Hooper v. Beecher*, N. Y. Ct. App. March 6, 1888; 15 N. E. Rep. 742.

12. APPEAL—Review on Appeal—Findings.——When a case has been remanded on appeal for the trial of the issues made up, the findings of the jury will not be disturbed on appeal, unless there is no evidence to support them.—*Barnum v. Barnum*, S. C. App. Va., March 31, 1887; 5 S. E. Rep. 372.

13. APPEAL—Time of Taking.——An appeal granted after the term at which final judgment was rendered will be dismissed.—*Bird v. Thompson*, S. C. Mo., March 5, 1888; 7 S. W. Rep. 279.

14. APPEAL—Trial De Novo—Equity.——To entitle an appellant to a trial *de novo* on appeal in an equity case, the abstract must state that all the evidence is contained therein. The certificate of the judge to the bill of exceptions that the foregoing is all the evidence offered in the case is not sufficient. —*Worthington v. Nelson*, S. C. Iowa, March 9, 1888; 36 N. W. Rep. 911.

15. ARREST—Warrant—Police Officer.——One who resists forcibly a public improvement may be arrested by a police officer without a warrant.—*Crosland v. Shaw*, S. C. Penn., March 5, 1888; 12 Atl. Rep. 849.

16. ASSIGNMENT—Equitable—Notice.——A contractor gave B an order on C, for whom he was building a house, to be paid out of the next money due him. D, C's husband, and her attorney, who held her funds with which she was erecting the building, both had notice of the order. C paid the contractor in full, not knowing of the order: *Held*, that C was not liable to B.—*Harvin v. Galluchat*, S. C. S. Car., March 5, 1888; 5 S. E. Rep. 359.

17. ATTORNEY—Lien—Purchase Pendente Lite.—— In a suit to foreclose a mortgage, certain bondholders appeared by counsel and resisted. They subsequently sold their bonds, and a decree of foreclosure was rendered: *Held*, that their attorney had a lien on the dividend payable on those bonds for his fee.—*Mahone v. Southern T. Co.*, U. S. C. C. (Va.), Dec. 18, 1887; 33 Fed. Rep. 702.

18. BAIL—Forfeiture—Conviction. —— A bail bond may, under Iowa law, be forfeited by failure of the principal to appear when ordered after conviction.—*State v. Baldwin*, S. C. Iowa, March 9, 1888; 36 N. W. Rep. 908.

19. BILLS AND NOTES—Accommodation Acceptor.—— An accommodation acceptor of a draft, who has paid it, is entitled to be re-imbursed, and the draft is only useful as evidence.—*Martin v. Muncy*, S. C. La., Feb. 13, 1888; 3 South. Rep. 640.

20. BILLS AND NOTES—Defenses—Warranty.—— In a suit on a note given for the difference in value on exchange of lands, defendant may defend by proof showing a breach of oral warranty as to the quality of the land.—*Green v. Batson*, S. C. Wis., Feb. 28, 1888; 36 N. W. Rep. 849.

21. BILLS AND NOTES—Place of Payment. —— Under Alabama law, a certificate of deposit, with no place of payment sufficiently designated thereon, is subject to equities.—*Renfro v. Merchants', etc. Bank*, S. C. Ala., Feb. 23, 1888; 3 South. Rep. 776.

22. BOND—Execution.——Where a bond of indemnity is excuted by the sureties before it has been filled up, it is, nevertheless, valid, if it is filled up afterward in good faith and in conformity with the purposes agreed upon.—*Bugger v. Cresswell*, S. C. Penn., March 5, 1888; 12 Atl. Rep. 829.

23. BOND—False Return—Parol Evidence. —— In an action on a constable's bond for making a false indorsement of forfeited on a replevin bond, the plaintiff may prove by parol that the indorsement is false.—*Craven v. Higgenbotham*, S. C. Ala., Feb. 23, 1888; 3 South. Rep. 777.

24. CARRIER—Negligence—Instructions.——In an action for the death of a passenger caused by the explosion of a steamboat through negligence of its officers, it is competent for the court to express an opinion as to the weight of evidence. It is error, under the circumstances stated, to direct a verdict for the defendant.—*Spear v. Philadelphia, etc. Co.*, S. C. Penn., Feb. 27, 1888; 12 Atl. Rep. 824.

25. CEMETERIES—Care—Cities. —— Chapter 15, Sess. Laws 1887, p. 330, relative to cemeteries, does not apply to cities of the second-class containing more than 5,000 inhabitants.—*State v. Bartling*, S. C. Neb., Feb. 21, 1888; 36 N. W. Rep. 811.

26. CERTIORARI—Substitute for Appeal.—— A *certiorari* as a substitute for an appeal lost will only be granted when the petitioner has been guilty of no laches and has been misled by representations by the opposing party.—*Williamson v. Boykin*, S. C. N. Car., Feb. 27, 1888; 5 S. E. Rep. 378.

27. CHATTEL MORTGAGE — Judgment — Priority. —— When plaintiff claims a mule mortgaged to him, which defendant claims as an execution purchaser, there being no evidence of indebtedness to the purchaser prior to the judgment, which is subject to the record of the mortgage, the plaintiff's claim is paramount--

Tompkins v. Henderson, S. C. Ala., Feb. 22, 1888; 3 South. Rep. 774.

28. CHATTEL MORTGAGE — Surrender — Innocent Purchaser.——When a mortgagor of personal property receives back the note and mortgage, which he shows to a party, who buys the mortgaged property from him, such purchaser is protected, though the property given to the mortgagee to satisfy the mortgage is taken from him under a prior lien.—*Wilkinson v. Solomon*, S. C. Ala., Feb. 16, 1888; 3 South. Rep. 705.

29. CHATTEL MORTGAGE — Unplanted Crop. —— A chattel mortgage of an unplanted crop will not sustain a statutory claim suit, unless there was an actual devery of the crop after it was gathered.—*Wetzler v. Kelly*, S. C. Ala., Feb. 21, 1888; 3 South. Rep. 747.

30. COLLISION—Tows—Turning. —— When two vessels are making up tows, holding their positions by steaming against a strong ebb tide, and one of them in turning to go out strikes the tow of the other, remaining in position, the moving vessel alone is in fault.—*The Osceola*, U. S. D. C. (N. Y.), Jan. 31, 1888; 33 Fed. Rep. 719.

31. CONSTITUTIONAL LAW — Drunkenness — Confinement.——The law of Wisconsin, confining inebriates, s unconstitutional.—*State v. Ryan*, S. C. Wis., Feb. 28, 1888; 36 N. W. Rep. 823.

32. CONSTITUTIONAL LAW — Interstate Commerce — Taxation—Sleeping Cars.——The Indiana statute which taxes sleeping cars operating partly in that State two per cent. on their receipts for services rendered in that State, is unconstitutional as regulating commerce between the States.—*State v. Woodruff, etc. Co.*, S. C. Ind., March 9, 1888; 15 N. E. Rep. 814.

33. CONSTITUTIONAL LAW—Local Legislation—Statute. ——The general law of New Jersey of March 9, 1877, abrogates all local legislation inconsistent with it, and, among others, the statutes relating to special assessments in East Orange.—*State v. East Orange*, S. C. N. J., Feb. 27, 1888; 12 Atl. Rep. 911.

34. CONSTITUTIONAL LAW — Valuation — Statute.—— Statute of Pennsylvania 1853, providing for taking the property of a seminary at a fixed valuation, is unconstitutional and void, because it does not provide the lawful means of ascertaining the true value of the property.—*Lebanon, etc. Co. v. Lebanon, etc. Co.*, S. C. Penn., March 5, 1888; 12 Atl. Rep. 857.

35. CONSTITUTIONAL LAW — Vested Rights — Swamp Lands.—— Michigan act of 1858, directed that interest on the moneys received from the sale of swamp land be paid to the counties in proportion to the amounts received from sale of swamp lands in the counties respectively, but the duty was not imposed on any one to furnish the data to make the distribution: *Held*, that such act may be revoked at pleasure.—*Sanilac Co. v. Aplin*, S. C. Mich., March 2, 1888; 36 N. W. Rep. 794.

36. CONTRACT—Carrier.——A carrier who has obtained possession of goods under a contract embodied in a letter from the purchaser, cannot vary that contract by the terms of a bill of lading which he caused to be forwarded to the purchaser.—*Park v. Preston*, N. Y. Ct. App., Feb. 28, 1888; 15 N. E. Rep. 705.

37. CONTRACT—Performance—Default.——Where the performance of a contract is prevented by the default of the defendant, he cannot set up the nonperformance of the contract in bar of an action on an accepted order for part of the contract price.—*Home Bank v. Drumgoole*, N. Y. Ct. App., March 20, 1888; 15 N. E. Rep. 747.

38. CONTRACT—Settlement—Consideration.——A settlement of accounts is a sufficient consideration for a promise to pay the balance found due.—*Schaber v. Brunning*, S. C. Iowa, March 9, 1888; 36 N. W. Rep. 910.

39. CORPORATIONS—Pledge of Stock.——A pledge of stock of a corporation is effected by a delivery of the certificate without notice to the corporation.—*Crescent, etc. Co. v. Deblieux*, S. C. La., Feb. 13, 1888; 3 South. Rep. 726.

40. CORPORATIONS—Stockholders—Unpaid Stock.—— When a judgment creditor of a corporation sues a stockholder, who holds unpaid stock received at 50 cents on the dollar for work done for it, such creditor is not bound by the contract, and the stockholder can only avail himself of the reasonable value of the work done as against such suit, even though the judgment was rendered against the corporation after he became a stockholder and after it became insolvent.—*Shickle v. Watts*, S. C. Mo., March 5, 1888; 7 S. W. Rep. 274.

41. CORPORATION — Water Company.——A corporation authorized to supply water by pipes, can provide in its by-laws that if its water rates and arreages are not paid the supply of water may be cut off.—*Appeal of Brumm*, S. C. Penn., March 5, 1888; 12 Atl. Rep. 855.

42. COSTS—Husband and Wife—Separate Estate.—— When a suit by a wife by her next friend for divorce and to remove her husband from the trusteeship of her separate estate is dismissed and costs adjudged to be levied out of her separate estate, such costs may be collected, if necessary, by a sale of such property described in the bill, but a personal judgment against her is erroneous.—*Balkum v. Kellum*, S. C. Ala., Feb. 16, 1888; 3 South. Rep. 696.

43. COSTS — Partition — Statute.——Construction of Pennsylvania statutes relative to costs in partition cases. When attorney's fees will be taxed as costs.—*Appeal of Biles*, S. C. Penn., Feb. 27, 1888; 12 Atl. Rep. 833.

44. COSTS—Replevin—Part of Property.——When, in replevin, plaintiff has judgment for only part of the property, both parties should recover their costs, under South Carolina law.—*Stoney v. Bailey*, S. C. S. Car., March 1, 1888; 5 S. E. Rep. 347.

45. COSTS — Statutes.——Construction of Delaware statutes relative to costs in cases in which suit is brought in a county other than that in which the defendant resides.—*Wood v. Short*, Del. Ct. Err. & App., Feb. 1, 1888; 12 Atl. Rep. 247.

46. COUNTIES—Warrants—Registration.——A county clerk is prohibited from registering a county warrant till ten days after it is issued.—*Means v. Webster*, S. C. Neb., Feb. 21, 1888; 36 N. W. Rep. 809.

47. COVENANT — Running with Land — Injunction — Public Policy.——A covenant in a deed of a part of a tract, that no mercantile business shall be carried on, runs with the land and is not against public policy and may be enforced by injunction.—*Morris v. Tuscaloosa M. Co.*, S. C. Ala., Feb. 15, 1888; 3 South. Rep. 689.

48. CRIMINAL LAW—Burglary—Alternative Intent.—— An indictment for burglary may, under Alabama law, allege in one count that the act was committed with intent to steal or to commit a rape.—*Dismukes v. State*, S. C. Ala., Feb. 2, 1888; 3 South. Rep. 671.

49. CRIMINAL LAW — Circumstantial Evidence—Character.——When the evidence, in a case of theft, is circumstantial, the State cannot, against defendant's objection, prove that he has been a convict.—*Guajardo v. State*, Tex. Ct. App., Feb. 1, 1888; 7 S. W. Rep. 331.

50. CRIMINAL LAW—Circumstantial Evidence—Instruction.——When the only evidence, in a larceny case, is that the stolen animal was found in A's possession, who bought it from the accused, a failure to instruct as to circumstantial evidence is error.—*Fuller v. State*, Tex. Ct. App., Jan. 28, 1888; 7 S. W. Rep. 330.

51. CRIMINAL LAW — Confessions.——All confessions are *prima facie* involuntary, and are inadmissible unless affirmatively proved to be voluntary.—*Amos v. State*, S. C. Ala., Feb. 21, 1888; 3 South. Rep. 749.

52. CRIMINAL LAW—Continuance—Absence of Witness. ——The absence of a witness affords no ground for a continuance or new trial, when his testimony would be hearsay and would be merely contradictory in part with a tendency to impeach the credibility of witnesses on the trial.—*State v. Perkins*, S. C. La., March 5, 1888; 3 South. Rep. 647.

53. CRIMINAL LAW — Embezzlement — Evidence.—— When, in the trial of a county treasurer for embezzlement, it was shown that the defendant collected large sums of money, which he had not accounted for, and that there were fraudulent vouchers and entries in his

books: *Held*, sufficient evidence to support a verdict of guilty.—*State v. Cowan*, S. C. Iowa, March 8, 1888; 36 N. W. Rep. 886.

54. CRIMINAL LAW—Failure to Indict—Imprisonment. ——A party imprisoned and indicted for different crimes at each term of court, cannot claim a discharge under the law requiring an indictment to be made before the end of the second term after his arrest.—*Waller v. Com.*, S. C. App. Va., Feb. 9, 1888; 5 S. E. Rep. 364.

55. CRIMINAL LAW — Forgery — Evidence.——In the trial of a forgery case, it is inadmissible to give in evidence the genuine signature of the party written in their presence that they may compare it with the alleged forged signature.—*State v. Koontz*, S. C. App. W. Va., Feb. 25, 1888; 5 S. E. Rep. 328.

56. CRIMINAL LAW — Homicide — Provocation. —— When the deceased in the morning made indecent proposals to the wife of the accused, of which she told him at noon, and he killed the deceased when he met him at night, it was error to charge, that to reduce the homicide to manslaughter the provocation therefor must have arisen at the time of the commission of the offense.—*Williams v. State*, Tex. Ct. App., Feb. 1, 1888; 7 S. W. Rep. 333.

57. CRIMINAL LAW — Homicide — Threats.——When communicated threats, followed by a subsequent attack and a killing, have been proved, intermediate threats may be proved in corroboration.—*State v. Williams*, S. C. La., Feb. 13, 1888; 3 South. Rep. 629.

58. CRIMINAL LAW—Infant — Capacity.——When an infant between 9 and 13 years of age is indicted for burglary, the State must show that he understood the illegality of his act, and witnesses may give their opinion thereon after stating their grounds therefor.—*Carr v. State*, Tex. Ct. App., Jan. 28, 1888; 7 S. W. Rep. 328.

59. CRIMINAL LAW — Insanity — Defense.——When a defendant relies upon insanity as an excuse for crime, he must prove it by a preponderance of evidence.—*Coates v. State*, S. C. Ark., March 10, 1888; 7 S. W. Rep. 304.

60. CRIMINAL LAW — Keeping Gaming Table.——An indictment for keeping a gaming table must show that the act was committed after the act of February 10, 1887, became operative. It makes no difference where the table was kept nor how it was otherwise used. Offenses committed prior to said act may still be punished as misdemeanors.—*Bibb v. State*, S. C. Ala., Feb. 1, 1888; 3 South. Rep. 711.

61. CRIMINAL LAW—Larceny—Proof.—— When, on a trial for larceny of one animal, the evidence shows a theft of two, the court must charge that the evidence concerning the second animal is only admissible to show motive, identity, etc.—*Coward v. State*, Tex. Ct. App., Jan. 28, 1888; 7 S. W. Rep. 332.

62. CRIMINAL LAW—Murder—Indictment. —— An indictment alleging that defendant did with malice aforethought kill H by shooting her with a pistol will sustain a conviction of murder in the first degree.—*Banks v. State*, Tex. Ct. App., Jan. 28, 1888; 7 S. W. Rep. 327.

63. CRIMINAL LAW — Murder — Threats — Evidence — Newly discovered Evidence.——Where the deceased has made threats to kill the accused, but has done nothing to carry those threats into execution, such threats constitute no defense for killing the deceased. Newly-discovered evidence, if merely cumulative, will not authorize the granting of a new trial.—*Gilmore v. People*, S. C. Ill., March 26, 1888; 15 N. E. Rep. 708.

64. CRIMINAL LAW—New Trials.——Motions for new trials are left largely in the discretion of the trial judge, and his rulings will not be disturbed unless it appears that his discretion has been unwisely or arbitrarily exercised.—*State v. Venables*, S. C. La., March 5, 1888; 3 South. Rep. 727.

65. CRIMINAL LAW—Perjury—Information.—— In an information for perjury, it is sufficient to charge generally that the false testimony was in respect to a matter material in the action in which it is given.—*Gandy v. State*, S. C. Neb., Feb. 21, 1888; 36 N. W. Rep. 817.

66. CRIMINAL LAW—Rape—Child. —— A person cannot be convicted, under Mississippi law, of an attempt to carnally know a female child under the age of ten years, without proof that the attempt was forcible and against her will.—*Bonner v. State*, S. C. Miss., March 12, 1888; 3 South. Rep. 663.

67. CRIMINAL LAW—Rape—Infant.——Under Arkansas law, carnal knowledge of a girl under the age of twelve years, if with her consent, is punishable by imprisonment in the penitentiary; if without her consent, or if she is incapable of consenting, is punishable with death.—*Coates v. State*, S. C. Ark., March 10, 1888; 7 S. W. Rep. 304.

68. CRIMINAL LAW—Sentence—Work.——Under Texas law, a county convict, who has worked at the county farm a sufficient time to satisfy his fine, is entitled to his discharge.—*Ex parte Dampier*, Tex. Ct. App., Jan. 28, 1888; 7 S. W. Rep. 330.

69. CRIMINAL LAW—Verdict—Absence of Accused.—— A verdict may be legally received and recorded when the accused voluntarily leaves the court room and fails to appear after the sheriff's proclamation for him to come and hear the verdict.—*State v. Perkins*, S. C. La. March 5, 1888; 3 South. Rep. 647.

70. CRIMINAL PRACTICE—Exclusion of Witnesses.—— In a criminal case, when the exclusion of the witnesses, after being sworn, is asked, it is discretionary with the court to allow some of them to remain.—*Carson v. State*, S. C. Ga., Feb. 24, 1888; 5 S. E. Rep. 295.

71. CUSTOMS DUTIES—Steel Ornaments.——Whether ornaments for belts, dresses or the hair, made of cut steel, brass or mother of pearl, be dutiable as manufactured articles not specially provided for as jewelry of all kinds, depend upon the meaning in the trade of the phrase "jewelry of all kinds."—*Robbins v. Robertson*, U. S. C. C. (N. Y.), Jan. 19, 1888; 33 Fed. Rep. 709.

72. DAMAGES—Ascertainment—Public Policy.——It is contrary to public policy to allow damages for a breach of contract to be liquidated outside of a trial, except when the real damages cannot be readily ascertained.—*Hubbard v. Epworth*, S. C. Mich., March 2, 1888; 36 N. W. Rep. 801.

73. DAMAGES — Exemplary Damages. —— Where a street car conductor pushes a boy, who has not paid his fare, off the car, whereby the boy falls and is run over by a following car and loses his leg, exemplary damages will not be allowed, if the act of the conductor appears to be neither wilful, wanton or malicious.—*Philadelphia, etc. Co. v. Orbann*, S. C. Penn., Feb. 27, 1888; 12 Atl. Rep. 816.

74. DAMAGES—Personal Injuries. —— When the evidence shows that a woman, who had been in good health, had received injuries, resulting in uterine troubles, from which she was still suffering, a verdict for $6,933 will not be set aside as excessive.—*Houston, etc. R. Co. v. Lee*, S. C. Tex., Jan. 31, 1888; 7 S. W. Rep. 324.

75. DEED—Delivery—Escrow.——Where a deed is delivered to a third party in escrow there is no delivery.—*Cherry v. Herring*, S. C. Ala., Feb. 1, 1888; 3 South. Rep. 667.

76. DEED—Description — Boundaries. —— When the land conveyed can be more certainly identified by running the courses and distances called for, the grant should be so determined, and it should not be left to the jury to decide whether they will so identify the grant or not.—*Bighorn v. McDowell*, S. C. Tex., Nov. 23, 1887; 7 S. W. Rep. 315.

77. DESCENT AND DISTRIBUTION — Collation. —— An heir to whom slaves have been donated must collate their value, though slavery was subsequently abolished. —*Succession of Haile*, S. C. La., March 5, 1888; 3 South. Rep. 630.

78. DESCENT—Conveyance—Subsequent Interest—— A conveyed her interest in her father's estate to B: *Held*, that she was not estopped to claim an interest therein acquired by a subsequent death of a brother and sister.—*McInnis v. Pickett*, S. C. Miss. March 12, 1888; 3 South. Rep. 660.

79. DISTURBANCE OF PUBLIC WORSHIP—Intent.——A person guilty of rude behavior may show a lawful excuse for his conduct, but cannot prove that he did not intend to interrupt an assemblage for public worship.—*Williams v. State*, S. C. Ala., Feb. 20, 1888; 3 South. Rep. 743.

80. DIVORCE — Jurisdiction — Waiver.——A wife, resident in Texas, brought an action for divorce against her husband, resident in New York. She obtained personal service on him in New York, and he appeared to the action in Texas and defended upon the merits: *Held* that, by such appearance and defense, he waived objection to the jurisdiction, and a divorce granted in Texas was valid against him in New York.—*Jones v. Jones*, N. Y. Ct. App., Feb. 28, 1888; 15 N. E. Rep. 707.

81. DIVORCE—Temporary Residence—Jurisdiction.——A wife went temporarily to Nebraska to obtain a divorce, and after obtaining it returned to Iowa. Under Nebraska law, a residence of six months is required to acquire a right to a divorce: *Held*, that the divorce was void, and might be attacked collaterally in Iowa.—*Neff v. Beauchamp*, S. C. Iowa, March 9, 1888; 36 N. W. Rep. 905.

82. DIVORCE—Wife—Attorney.——A husband is liable for the fees of an attorney employed by his wife in an unsuccessful divorce suit, and an allowance made at the return term of the divorce suit is not a final adjudication as to the amount of attorney's fees.—*Clyde v. Peavy*, S. C. Iowa, March 8, 1888; 36 N. W. Rep. 883.

83. DOWER—Renunciation—Certificate.——A renunciation of dower containing the proper certificate signed by the officer, followed by the woman's signature and then a seal, the three in one line, is good, under South Carolina law.—*Vinson v. Nicholas*, S. C. S. Car., March 5, 1888; 5 S. E. Rep. 357.

84. DOWER—Separation.——Where husband and wife agreed to live separately, the husband binding himself to pay her a stipulated sum per annum during coverture, the wife in such case is entitled to dower after the husband's death.—*Ireland v. Ireland*, N. J. Ct. Chan., Feb. 7, 1888; 12 Atl. Rep. 184.

85. DRAINAGE—Notice—Statute.——Where, under the drainage laws of Indiana, a notice was given which did not follow the terms of the statute precisely, but was treated as sufficient by the commissioners, their ruling on the subject was held conclusive.—*Montgomery v. Wasem*, S. C. Ind., Feb. 18, 1888; 15 N. E. Rep. 795.

86. DRAINAGE—Notice—Statute.—— Under the drainage laws of Indiana, a notice given which is adjudged sufficient by the court before it is acted upon, the petition will authorize a judgment by the court.—*Hackett v. State*, S. C. Ind., March 6, 1888; 15 N. E. Rep. 790.

87. EASEMENT—Grant—Statute—Estate.——The right to carry water through pipes is an estate "in fee," and must, under the statutes of New York, be conveyed by deed duly attested and recorded.—*Nellis v. Munson*, N. Y. Ct. App., Feb. 28, 1888; 15 N. E. Rep. 739.

88. EJECTMENT—General Denial—Limitations.—— In ejectment, under a general denial, the defendant may avail himself of the statute of limitations.—*Stoker v. Green*, S. C. Mo., March 5, 1888; 7 S. W. Rep. 279.

89. EMINENT DOMAIN—Constitution.—— A provision in a city charter that, in assessing damages for land taken by eminent domain, the benefits received shall be considered as unconstitutional, and *certiorari* will lie to review the action of the city in laying out a street.—*Faust v. Huntsville*, S. C. Ala., Feb. 22, 1888; 3 South. Rep. 771.

90. EMINENT DOMAIN—Damages—Procedure.—— In a proceeding to assess damages for the taking of private property for public uses under the right of eminent domain, the verdict of a jury who have inspected the premises and assessed the damages below the highest and above the lowest amount indicated by the witnesses will not be disturbed.—*Calumet, etc. Co. v. Moore*, S. C. Ill., March 26, 1888; 15 N. E. Rep. 764.

91. EMINENT DOMAIN—Highways—Compensation.—— When the statute authorizes commissioners to locate a State road to allow damages to parties claiming injury therefrom with a right of appeal to the circuit court, such law sufficiently provides for just compensation.—*State v. Hogue*, S. C. Wis., March 27, 1888; 36 N. W. Rep. 861.

92. EMINENT DOMAIN — Railroads.——The right of eminent domain given to a railroad is restricted to so much real estate as may be necessary for the location, construction and convenient use of its road.—*Forney v. Fremont, etc. R. Co.*, S. C. Neb., Feb. 21, 1888; 36 N. W. Rep. 806.

93. EMINENT DOMAIN — Railroads — Jurisdiction.—— Under Texas laws, the district court has no jurisdiction to condemn law at the instance of a railroad.—*Gulf, etc. R. Co. v. Poindexter*, S. C. Tex., Jan. 31, 1888; 7 S. W. Rep. 316.

94. EMINENT DOMAIN — State Park.——Chapter 129, Gen. Laws 1885, providing for the condemnation of lands for a State park, is constitutional.—*In re Lands of State Park*, S. C. Minn., March 15, 1888; 36 N. W. Rep. 874.

95. EQUITY—Fraud—Limitation of Action.——Under Alabama law, a suit in equity, filed October 29, 1880, to set aside a decree in equity obtained March 12, 1877, by an alleged fraud, of which complainant had knowledge May, 1877, is barred.—*Heflin v. Ashford*, S. C. Ala., Feb. 21, 1888; 3 South. Rep. 760.

96. EQUITY—Jurisdiction — Partnership.——In a suit to determine the ownership of certain personal property, defendant claimed title as partner of plaintiff's deceased husband, and the trial of this issue was transferred to the chancery court: *Held*, correct.—*McReynolds v. McReynolds*, S. C. Iowa, March 9, 1888; 36 N. W. Rep. 903.

97. EQUITY—Lack of Legal Remedy.——A had B's note secured by a chattel mortgage which he could foreclose without litigation. B had a perfect defense to the note: *Held*, that equity could cancel both note and mortgage.—*Badgett v. Frick*, S. C. S. Car., March 5, 1888; 5 S. E. Rep. 355.

98. EQUITY—Release.——No act of a creditor tending to show a release of his debt will operate as such release in equity, unless it would have the same effect at law.—*Trophagen's Exr. v. Voorhees*, N. J. Ct. Chan., March 6, 1888; 12 Atl. Rep. 895.

99. EQUITY—Trial by Jury.——In equity cases, trial by jury is not a matter of right; the court may adopt that method of ascertaining facts, but it is not bound to do so or to accept as final the verdict of the jury.—*Acker v. Leland*, N. Y. Ct. App., March 13, 1888; 15 N. E. Rep. 743.

100. ESTATE — Contingent Remainder.——Where a testator devised lands to his son for life, remainder to his son's children, if he shall have any living at the time of his death, remainder over, in case of failure of such issue, to nephews and nieces: *Held*, that the nephews and nieces had a vested contingent remainder in the land, and were necessary parties to any proceeding in the life-time of the son for the sale of the land in question.—*Wilson v. White*, N. Y. Ct. App., March 20, 1888; 15 N. E. Rep. 749.

101. ESTOPPEL — By Record.——Parties are held to their allegations of record, and are not permitted to falsify what they have solemnly declared to be the fact.—*Gandet v. Gauthreaux*, S. C. La., Feb. 13, 1888; 3 South. Rep. 645.

102. ESTOPPEL—County Treasurer—Money.——When a county treasurer receives money from a tax collector as county taxes, he and his sureties are estopped to deny that it was county money, regardless of the form of his receipt.—*Coleman v. Pike County*, S. C. Ala., Feb. 21, 1888; 3 South. Rep. 755.

103. ESTRAY—Paying Charges.——The failure of the owner to pay charges for keeping an estray before the expiration of a year does not forfeit his right, when it is caused by the absence or other act of the taker, or

other lawful excuse is shown.—*Stephenson v. Brunson*, S. C. Ala., Feb. 22, 1888; 3 South. Rep. 768.

104. EVIDENCE—Declarations—Agent.——Declarations of the attorney of the assignee of the original holders of a note, are not evidence against a subsequent *bona fide* holder thereof.—*First Nat. Bank v. Anderson*, S. C. S. Car., Feb. 27, 1888; 5 S. E. Rep. 343.

105. EVIDENCE — Declarations — Possession.——The declarations of a party in possession of personal property, showing the character or extent of his claim, is admissible to prove ownership.—*Drum v. Harrison*, S. C. Ala., Feb. 13, 1888; 3 South. Rep. 715.

106. EXECUTION—Inadequacy of Price—Evidence.——Where a question is made as to inadequacy of price, and evidence is given as to the value of adjoining property, it is competent to show what that adjoining property sold for at sheriff's sale.—*Bartolet v. Saylor*, S. C. Penn., March 5, 1888; 12 Atl. Rep. 854.

107. EXECUTORS — Action by — Set-off.——When an administrator sues for a claim due the intestate's estate, a set off, which was not filed in the statutory period against the estate, cannot be pleaded.—*Patrick v. Petty*, S. C. Ala., Feb. 23, 1888; 3 South. Rep. 779.

108. EXECUTORS — Devised Estate — Proceeds.——Devisees of land are entitled to money paid to the executors for damages thereto by exercise of eminent domain. Rent for the year of the testator's death of land devised by him goes into the residuum of his estate.—*Parker v. Chestnutt*, S. C. Ga., March 2, 1888; 5 S. E. Rep. 289.

109. EXECUTORS — Deed — Separate Estate.——The deed of an administrator to lands sold for debts contracted while the intestate was under coverture passed no title.—*Boston v. Murray*, S. C. Mo., Feb. 20, 1888; 7 S. W. Rep. 273.

110. EXECUTORS—Failure to Collect.——An administrator placed a due bill for collection with an attorney, who negligently let it run out of date and altered it with knowledge of the administrator, who failed to collect it from the attorney: *Held*, that the administrator was liable in the absence of proof that the attorney was insolvent.—*Mills v. Talley*, S. C. App. Va., March 24, 1887; 5 S. E. Rep. 368.

111. EXECUTOR—Lien—Incumbrance—Sale.——Where an executor sells land, and at the sale a judgment creditor gives notice of his lien, and the executor agrees with the purchaser that he shall have a clear title, the purchaser has a right to such title clear of all incumbrance.—*Appeal of Reiner*, S. C. Penn., March 5, 1888; 12 Atl. Rep. 850.

112. EXECUTORS—Sale—Stale Demand.——When lands were sold under a probate decree and bought by the administrator, a suit by the heirs more than twenty years thereafter to enforce an alleged lien for unpaid purchase money is stale.—*Solomon v. Solomon*, S. C. Ala., Feb. 14, 1888; 3 South. Rep. 679.

113. EXECUTORS — Sale of Land — Correction.——An application to amend the petition and decree for the sale of land of a decedent can only be made by the purchaser, and the heirs of the decedent must have notice.—*Lee v. Williams*, S. C. Ala., Feb. 20, 1888; 3 South. Rep. 718.

114. EXECUTORS — Sale of Realty — Impeaching.——Heirs cannot have a sale of realty by an administrator canceled as against a *bona fide* purchaser from the administrator's vendee, though the vendee really purchased for the administrator.—*Sanders v. Sorrell*, S. C. Miss., March 12, 1888; 3 South. Rep. 661.

115. EXECUTORS — Personal Property — Lien.——An executor has full control of the personal property, and may release a lien on real estate.—*Stribling v. Splint Coal Co.*, S. C. App. W. Va., Feb. 25, 1888; 5 S. E. Rep. 321.

116. EXECUTORS — Purchase — Liability.——An executor sold real estate according to the will and purchased part of it himself, and invested the money received, together with some of his own, in Confederate bonds, which became worthless: *Held*, that under South Carolina law, he was liable to the devisees for the amount of such purchases made by him.—*Finch v. Finch*, S. C. S. Car., March 5, 1888; 5 S. E. Rep. 348.

117. FENCE—Partition—Statute.——Where an action is brought to recover the value of a partition fence, under the statute of Pennsylvania it cannot be defeated by showing that the fence is not on the true line.—*Trego v. Pierce*, S. C. Penn., March 5, 1888; 12 Atl. Rep. 864.

118. FERRY—License—Owner.——When a license to operate a ferry is granted to the apparent owner in possession of land, the subsequent recovery of the land by the real owner does not operate as a revocation of the license.—*McCearly v. Swayze*, S. C. Miss., March 5, 1888; 3 South. Rep. 657.

119. FISHERIES—Oyster Laws.——A suit brought under the act to develop the oyster industry, is predicated upon the ownership of land acquired before the passage of the act with the exclusive right to use the bayous, lakes, etc., in it for the purpose of planting oysters, etc.—*Morgan v. Negodich*, S. C. La., Dec. 19, 1887; 3 South. Rep. 636.

120. FRANCHISE—Ferry—Statute.——Under the statute laws of Pennsylvania, the right to maintain a ferry is a franchise, which can only be acquired by grant from the State.—*Appeal of Douglass*, S. C. Penn., Jan 3, 1888; 12 Atl. Rep. 834.

121. FRAUD—Constructive Fraud.—— Where a son sells to his father his property, to pay the debt which he owes his father, upon an agreement that the property should be returned to the son after the father had been paid out of it, such sale is constructively fraudulent as to the other creditors of the son.—*Frey v. Gessler*, S. C. Penn., March 5, 1888; 12 Atl. Rep. 854.

122. FRAUD—Rescission of Contract.——A sale of land for land scrip, which the owner represents of a certain value, and may be located on valuable land in Texas, which he knows to be false, may be set aside for fraud.—*Cowles v. Barber*, S. C. Iowa, March 8, 1888; 36 N. W. Rep. 897.

123. FRAUDS—Statute of—Memorandum.——A memorandum of the sale of goods, which does not show which party was vendor nor which was vendee, is not sufficient, under the statute of frauds of Mississippi.—*Frank v. Eltingham*, S. C. Miss., March 5, 1888; 3 South. Rep. 655.

124. FRAUDULENT CONVEYANCE.——Where a debtor conveys his property to defraud a particular creditor, such conveyance is void as to other creditors, although his property is sufficient to pay all his debts.—*Barrett v. Nealon*, S. C. Penn., March 5, 1888; 12 Atl. Rep. 861.

125. GAMING—Cotton Futures.—— When a party purchases cotton on his own account, but at the request and for the benefit of another, he cannot sue the latter for the money lost thereby, when the cotton was never delivered.—*Walters v. Comer*, S. C. Ga., March 3, 1888; 5 S. E. Rep. 292.

126. GOOD WILL—What Constitutes.——A contract of sale of good-will, with an agreement not to engage in the business for a term of years, is not to be extended beyond its plain meaning, and it does not extend to an occasional act or isolated services.—*Nelson v. Johnson*, S. C. Minn., March 5, 1888; 36 N. W. Rep. 868.

127. GUARDIAN AND WARD — Compensation.—— Circumstances stated under which a guardian, although he has waived his rights to commissions, may still be entitled to compensation for his services.—*Appeal of Williams*, S. C. Penn., Feb. 27, 1888; 12 Atl. Rep. 826.

128. HIGHWAYS—Dedication.—— In the absence of clear proof of dedication or formal assent by the owner, public user of a road for thirty years or more will not make it a public road.—*McCarley v. Lemeunier*, S. C. La., March 5, 1888; 3 South. Rep. 649.

129. HIGHWAYS — Mandamus — Certiorari.—— When county commissioners refuse to grant a petition to establish a private road, claiming that the law authorizing it is unconstitutional, the remedy is by *mandamus*, and not by *certiorari*.—*Steele v. Madison County*, S. C. Ala., Feb. 22, 1888; 3 South. Rep. 761.

130. HIGHWAYS—Public Commons—Obstructions.——A party owning lands by a public commons, adjacent to a city, cannot enjoin the construction of a railroad across it, though it may obstruct travel from his place to the city.—*Sheffield, etc. R. Co. v. Moore*, S. C. Ala., Feb. 14, 1888; 3 South. Rep. 686.

131. HIGHWAY—Railroad — Damages. —— A private person who has accepted compensation from a railroad company for right of way over her land, cannot sue the company because the embankment is an inconvenience to her. Nor can she sue for the public inconvenience incident to the embankment obstructing the highway. *Appeal of Campbell*, S. C. Penn., March 5, 1888; 12 Atl. Rep. 843.

132. HOMESTEAD—Decedent — Debts. —— Under the Arkansas constitution, a probate court cannot order the sale of the homestead to pay the debts of the deceased, subject to the homestead right of a minor child. *Stayton v. Halpern*, S. C. Ark., March 10, 1888; 7 S. W. Rep. 304.

133. HOMESTEAD—Tenancy in Common—Partition.——A homestead cannot be set off in lands held in common till after partition.—*Mellichamp v. Mellichamp*, S. C. S. Car., Feb. 23, 1888; 5 S. E. Rep. 333.

134. HUSBAND AND WIFE—Separate Estate — Vested Rights.——Act Ala., Feb. 28, 1887 (Code 1886, §§ 2341-56), does not affect a suit brought prior thereto to enforce a claim for necessaries and supplies against a wife's separate estate.—*Jordan v. Smith*, S. C. Ala., Feb. 10, 1888; 3 South. Rep. 703.

135. HUSBAND AND WIFE—Statute.——The provision of the statute of 1862, which makes the husband liable for the debts of his wife, does not apply to cases arising under antecedent marriages.—*Marx v. Addoms*, S. C. N. J., Feb. 27, 1888; 12 Atl. Rep. 909.

136. INJUNCTION— Bond — Damages. —— When the damages awarded on the dissolution of an injunction exceed the penalty of the bond, the obligee, in a suit on the bond, is entitled to a judgment for the penalty of the bond, with interest thereon, from the time the damages were awarded, and to interest on the gross judgment thereafter.—*State v. Purcell*, S. C. App. W. Va., Feb. 18, 1888; 5 S. E. Rep. 301.

137. INJUNCTION—Damages—Continuance.—— Where an injunction was dissolved and leave given to defendant to make proof of damages, and the case continued to the next term without an order entered of record to that effect, the court will thereafter be authorized to award damages, the case not having been disposed of.—*Poyer v. Village of Desplaines*, S. C. Ill., March 26, 1888; 15 N. E. Rep. 768.

138. INJUNCTION—Execution—Satisfaction.——A purchaser of land, who has not yet paid the purchase money, cannot enjoin the executions against it on judgments against a former owner, which judgments appear satisfied of record, when he does not allege that his grantor was misled thereby.—*Yates v. Mead*, S. C. Miss., March 5, 1888; 3 South. Rep. 651.

139. INJUNCTION — Judgment — Bond. —— When the answer to an action to enjoin a judgment rendered without service of process, denies the only defense urged to the judgment, the injunction should be dissolved upon the giving of the refunding bond, authorized by Alabama law.—*Rice v. Tobias*, S. C. Ala., Feb. 1, 1888; 3 South. Rep. 670.

140. INJUNCTION — Temporary Injunction — Appeal — Review.——Where the force and effect to be ascribed to certain allegations in a complaint, which form a material fact as to plaintiff's right to relief, are seriously questioned, the court will not review an order granting a temporary injunction based on such complaint.—*Strasser v. Moonelis*, N. Y. Ct. App., March 6, 1888; 15 N. E. Rep. 730.

141. INSANITY—Procedure — Equity. —— A court of equity cannot, at the instance of a third party, decree that a person is insane and set aside his conveyances on that ground. There should be the verdict of a jury or other legal procedure to sustain such a ruling.—*Appeal of Meurer*, S. C. Penn., March 5, 1888; 12 Atl. Rep. 868.

142. INSTRUCTION.——Where the instructions, taken altogether, present a fair statement of the law, the judgment will not be disturbed.—*Hutchins v. Weldin*,, S. C. Ind., March 8, 1888; 15 N. E. Rep. 804.

143. INSURANCE—Mandamus—Assessment. ——When a mutual insurance company has adjusted a loss, but failed to levy an assessment, the insured may amend his petition and pray a *mandamus* to compel the levy of an assessment to pay his loss.—*Harl v. Pottawattamie, etc. Co.*, S. C. Iowa, March 8, 1888; 36 N. W. Rep. 880.

144. INSURANCE—Mutual— Assessment. —— Where a note given to a mutual insurance company bears interest, but none is paid, such note is liable to assessment to meet losses.—*Crawford v. Susquehanna, etc. Co.*, S. C. Penn., March 5, 1888; 12 Atl. Rep. 844.

145. INSURANCE—Mutual—Estoppel.—— A mutual insurance company is estopped to deny its liability when it has assessed the administrator of the insured on the policy and received payment from him.—*Harl v. Pottawattamie, etc. Co.*, S. C. Iowa, March 8, 1888; 36 N. W. Rep. 880.

146. INSURANCE—Reinsurance—Condition.—— Where a policy is issued which is conditioned to be void if other insurance be obtained on the property, is not rendered valid by the fact that the later policy is also void because it was conditioned that no previous insurance on the property had been obtained.—*American, etc. Co. v. Replogel*, S. C. Ind., March 8, 1888; 15 N. E. Rep. 810.

147. INTERPLEADER — County Funds. —— A county judge, holding county moneys to be applied in compromise of county bonds, cannot file a bill of interpleader in his own name. The bill should be in the name of the county.—*Patrick v. Robinson*, S. C. Ala., Feb. 15, 1888; 3 South. Rep. 694.

148. INTERSTATE COMMERCE — Examination of Engineers.——The act relative to examining railroad engineers relative to defective sight is constitutional, though the engineers were employed under contracts made out of the State.—*Nashville, etc. R. Co. v. State*, S. C. Ala., Feb. 13, 1888; 3 South. Rep. 702.

149. INTERSTATE COMMERCE LAW—Licensing Foreign Corporations.——A law requiring a foreign corporation to pay a license tax for the privilege of keeping an office in a State is constitutional.—*Pembina, etc. Co. v. Pennsylvania*, U. S. S. C., March 19, 1888; 8 S. C. Rep. 737.

150. INTOXICATING LIQUORS—Indictment. —— An indictment for violation of a local option law must allege that the local option was in force as the result of an election held for that purpose.—*Norton v. State*, S. C. Miss., March 12, 1888; 3 South. Rep. 665.

151. INTOXICATING LIQUORS—Illegal Sale—Agency.—— When a clerk of a druggist makes an illegal sale of intoxicating liquors kept in the drug store, the druggist is responsible therefor, though the sale was without his knowledge and contrary to his instructions.—*State v. Denoon*, S. C. App. W. Va., Feb. 25, 1888; 5 S. E. Rep. 315.

152. INTOXICATING LIQUORS—Suspending Law.——An indictment for selling liquor may be tried under the general, law, though in the meantime the local option law has been adopted.—*Winterton v. State*, S. C. Miss., Feb. 13, 1888; 3 South. Rep. 735.

153. JUDGMENT—Authority to Confess.——A promissory note with a power of attorney to confess judgment for such amount as may appear to be unpaid thereon, authorizes a confession of judgment for an amount actually due, not that to become due.—*Reid v. Southworth*, S. C. Wis., March 27, 1888; 36 N. W. Rep. 866.

154. JUDGMENT— Confession—Mistake.——Where an attorney, by mistake of the clerk, confesses judgment for a defendant who had not authorized it, such judgment will be stricken out as to that defendant.—*Heaps v. Hoopes*, Md. Ct. App., March 14, 1888; 12 Atl. Rep. 682.

155. JUDGMENT—Confession — Warrant of Attorney. ——A judgment by confession in an amicable action is not appealable under the statute which gives an ap-

peal, when the court refuses to open a judgment entered upon warrant of attorney.—*Appeal of Township of Blythe*, S. C. Penn., March 5, 1888; 12 Atl. Rep. 849.

156. JUDGMENT — Default — Attorney's Fee. —— A promissory note for money including ten per cent. for attorney's fee, will support a judgment by default for the amount due, including ten per cent. for attorney's fee.—*Wood v. Winship M. Co.*, S. C. Ala., Feb. 21, 1888; 3 South. Rep. 757.

157. JUDGMENT—Default—Setting Aside.——When a defendant does not appear at the trial after having entered his appearance, he is not entitled, under Nebraska code, § 1001, to have the judgment set aside.—*Western M. B. Ass. v. Pace*, S. C. Neb., Feb. 29, 1888; 36 N. W. Rep. 816.

158. JUDGMENT —Default—Summons.——When, in a foreclosure case, it does not appear by the affidavit of service of the summons made by private persons, that a copy of the summons was left with any of the defendants, a judgment by default must be set aside.—*Wilkinson v. Chilson*, S. C. Wis., Feb. 28, 1888; 36 N. W. Rep. 836.

159. JUDGMENT—Default — Vacation.——A judgment by default will not be vacated on grounds which were a proper defense to the action itself, especially when the affidavits for and against the motion are conflicting.—*Higgins v. Wait*, S. C. S. Car., March 14, 1888; 5 S. E. Rep. 363.

160. JUDGMENT—Lien.——A judgment of the district court ceases to be a lien on land after ten years, and also when ordered canceled by the court.—*Worthington v. Nelson*, S. C. Iowa, March 9, 1888; 36 N. W. Rep. 911.

161. JUDGMENT — Lien — Venditioni Exponas. —— A judgment was rendered against A before he made a deed of trust. A writ of *fi. fa.* was issued and returned not satisfied. Thereupon a writ of *venditioni ex.* was ordered issued, and the sale was made at the next term of court. The lien of the judgment would have expired between the order and the time of issue of the *vend. ex.*: *Held*, that a purchaser at such sale had a better title than that of one buying at trustees' sale under the deed of trust.—*Huff v. Morton*, S. C. Mo., March 5, 1888; 7 S. W. Rep. 283.

162. JUDGMENT—Reopening—Evidence.——The court will not open a judgment on a note on vague and unsatisfactory evidence of witnesses many years after the transaction against the testimony of the payee, who is corroborated by entries on his bank book.—*Appeal of Irwin*, S. C. Penn., March 5, 1888; 12 Atl. Rep. 840.

163. JUDGMENT — Res Adjudicata—Privies.——When the defendant in a suit to recover real property shows that in a former suit between this plaintiff and A, the right to the possession of the property had been adjudged in favor of A from whom the defendant bought, the plaintiff is barred by the former judgment.—*Adams County v. Graves*, S. C. Iowa, March 8, 1888; 36 N. W. Rep. 889.

164. JURISDICTION — Courts —Presumption.——In an action of ejectment, where the lands were sold under execution, the presumption that the court had jurisdiction cannot be contradicted by parol evidence.—*Marks v. Matthews*, S. C. Ark., March 10, 1888; 7 S. W. Rep. 303.

165. JURISDICTION—Federal Courts—State Judgments. ——A federal court cannot decree a judgment by confession in a State court to be an assignment for the benefit of creditors.—*Goldsmith v. Brown*, U. S. C. C. (Mo.), Feb. 8, 1888; 33 Fed. Rep. 691.

166. JURISDICTION—Federal Conrt—Subsequent Matter. ——When a federal court has jurisdiction of a cause between citizens of the same State, it will determine all questions in the cause, but will not consider any subsequently arising.—*Omaha, etc. R. Co. v. Cable Tram-way*, U. S. C. C. (Neb.), Feb. 6, 1888; 33 Fed. Rep. 689.

167. JURISDICTION — Federal Question —Appeal.—— When a State court determines a case without giving any effect to a State law, claimed in the writ of error to impair the obligation of the contract in controversy, the writ will be dismissed.—*Kreiger v. Shelby R. Co.*, U. S. S. C., March 19, 1888; 8 S. C. Rep. 752.

168. JURISDICTION—Federal Question—Patents.——A decision of a State court, that under an agreement a license under a patentee is estopped from denying the validity of subsequent reissues of the letters patent, does not involve a federal question.—*Dale, etc. Co. v. Hyatt*, U. S. S. C., March 19, 1888; 8 S. C. Rep. 756.

169. JURISDICTION — Federal Question—Patents—Certificate.——In a suit on a contract for certain royalties on a patent for rope reels, evidence was offered that defendant sold rope reels like those mentioned in the contract. At this time no letters patent were in the case, and plaintiff's right of recovery was limited to such reels: *Held*, that the case did not arise under the patent laws: *Held*, that a certificate from the State judge, that a federal question was determined adversely to plaintiff in error, cannot supply the want of all evidence of such question in the record.—*Felix v. Schamweber*, U. S. S. C., March 19, 1888; 8 S. C. Rep. 759.

170. JURISDICTION—Federal Question—Writ of Error. ——When a State supreme court bases its decision upon the general law of the State, and the construction of the charter of a corporation and of a license to the corporation from a city, no federal question is involved, *New Orleans, etc. Co. v. Louisana S. R. Co.*, U. S. S. C., March 19, 1888; 8 S. C. Rep. 741.

171. JUSTICE OF THE PEACE—Jury Trial—Fee.——If a jury is demanded at the time of joining issue in a case before a justice of the peace, the jury fee may be paid at any time before the trial is begun by swearing witnesses.—*Pontiac, etc. R. Co. v. Hopkinson*, S. C. Mich., March 2, 1888; 36 N. W. Rep. 797.

172. LANDLORD AND TENANT—Attachment for Rent—Jurisdiction.——The mayor of Port Gibson may issue an attachment for rent to be served in the county.—*Smith v. Jones*, S. C. Miss., March 5, 1888; 3 South. Rep. 740.

173. LANDLORD AND TENANT — Defective Premises—Third Party.——When a person is injured by reason of the defective condition of property in the possession of a tenant, the landlord cannot be held liable, unless such defect existed at the time the premises were leased.—*Johnson v. McMillan*, S. C. Mich., March 2, 1888; 36 N. W. Rep. 803.

174. LANDLORD AND TENANT—Deposit—Forfeiture.—— A deposit made by a tenant to secure his rent, is not forfeited by a breach of the contract in consequence of which he was dispossessed.—*Scott v. Montells*, N. Y. Ct. App., March 6, 1888; 15 N. E. Rep. 729.

175. LANDLORD AND TENANT—Purchase with Option of Lease.——On contract for a sale of lands, the parties may contract that at the option first of the purchaser, then of the owner, it be turned into a lease, and when so changed it creates the relation of landlord and tenant from the time the contract was made.—*Drum v. Harrison*, S. C. Ala., Feb. 22, 1888; 3 South. Rep. 769.

176. LEASEHOLDS—Duration.——In Alabama, a leasehold is void only for the excess over twenty years.—*Robertson v. Hays*, S. C. Ala., Feb. 1, 1888; 3 South. Rep. 674.

177. LICENSES — Peddlers of Medicine.——One who gives free exhibitions in a tent, and while so doing sells his own medicines there, is not liable to the license tax imposed by the revenue law of December 11, 1886, as a peddler of medicine.—*Randolph v. Yellowstone Kit*, S. C. Ala., Feb. 20, 1888; 3 South. Rep. 706.

178. LICENSES—Pistol Cartridges. ——Cartridges for pistols proper, and cartridges for rifles and pistols are included in the law of December 11, 1886, imposing a license on dealers therein, but the law does not apply to cartridges used only in rifles.—*Union, etc. Co. v. Teague*, S. C. Ala., Feb. 20, 1888; 3 South. Rep. 709.

179. LIMITATIONS — Husband and Wife. —— In an action against husband and wife each pleaded the statute of limitations. That issue was found in favor of the wife but against the husband: *Held*, that it was error to direct a verdict for both defendants under the law of Maryland.—*Wilmer v. Gaither*, Md. Ct. App., Feb. 3, 1888; 12 Atl. Rep. 253.

180. LIMITATIONS—Land — Adverse Possession.——A vendee of real estate upon finding an outstanding tax-title, notified his vendor that he would not complete the purchase, and he abandoned the premises. Subsequently he took possession under the tax title: *Held*, that the statute of limitations began to run against the vendor from the time of default of payment of the last installment on the contract.—*Cook v. Hopkins*, S. C. Mich., March 2, 1888; 36 N. W. Rep. 790.

181. LITERARY PROPERTY—Personalty.——All innocent literary property, the product of mental effort, is entitled to the same protection as other personal property.—*Aronson v. Baker*, N. J. Ct. Chan., Feb. 7, 1888; 12 Atl. Rep. 177.

182. MANDAMUS—Restoring Streets.——In a *mandamus* proceeding against railroads to restore a street to its proper condition, which includes a bridge occupied by two railroads, neither railroad can be compelled to surrender its property or change its route further than is reasonably necessary.—*State v. St. Paul, etc. R. Co.*, S. C. Minn., March 6, 1888; 36 N. W. Rep. 870.

183. MASTER AND SERVANT—Appliances.——A master is liable to his servant for injuries resulting from not furnishing the means and appliances necessary for the efficient and safe performance of their duties.—*Claircin v. Western U. T. Co.*, S. C. La., Feb. 13, 1888; 3 South. Rep. 625.

184. MASTER AND SERVANT—Passenger—Brakeman.——A railroad is not liable for injuries sustained by a passenger while acting as brakeman under orders of a conductor, whom he was under no obligation to obey, and who did not employ him.—*Propst v. Georgia, etc. R. Co.*, S. C. Ala., Feb. 22, 1888; 3 South. Rep. 764.

185. MASTER AND SERVANT—Tort of Servant.——The question of the liability of the master for the wanton assault of his servant on one who entered a sleeping car to ask the privilege of washing his hands, depends upon the question, whether the act done was something in the line of his employment, and which, if lawfully done, would have been within the scope of his functions.—*Williams v. Pullman P. C. Co.*, S. C. La., Feb. 13, 1888; 3 South. Rep. 631.

186. MECHANIC'S LIEN—Description of Property.——When the property on which a mechanic's lien is sought is described as thirty lengths of corn cribbing at Mills station, the description is too indefinite.—*Roose v. Billingsley*, S. C. Iowa, March 8, 1888; 36 N. W. Rep. 885.

187. MECHANIC'S LIEN — Limitation—Instruction.——An instruction to the jury that the mechanic's lien was filed within the time after the completion of the work limited by the statute, is erroneous, because it takes from the jury the question whether the lien was filed within the time after the completion of the work limited by the law, the evidence as to when the work was completed being conflicting.—*Galland v. Schroeder*, S. C. Penn., March 5, 1888; 12 Atl. Rep. 866.

188. MECHANIC'S LIEN—Parties.——A suit to enforce a mechanic's lien cannot be maintained against a party, as sole defendant, who made the contract as agent as a trustee.—*Roman v. Thorn*, S. C. Ala., Feb. 21, 1888; 3 South. Rep. 759.

189. MECHANIC'S LIEN—Sidewalks.——No mechanic's lien is allowed, under Iowa law, for constructing a sidewalk along a street.—*Coenen v. Staub*, S. C. Iowa, March 8, 1888; 36 N. W. Rep. 877.

190. MECHANIC'S LIEN — Statement—Evidence.——In a mechanic's lien case, a statement verified by a witness who ordered the goods is properly allowed to go to the jury.—*Mooney v. Peck*, N. J. Ct. Err. & App., November Term, 1887; 12 Atl. Rep. 177.

191. MORTGAGE—Absolute Deed.——When an absolute deed containing a right of repurchase is claimed to be a mortgage, the oral evidence must reasonably and satisfactorily establish that a mortgage was intended by both parties.—*Perdue v. Bell*, S. C. Ala., Feb. 16, 1888; 3 South. Rep. 698.

192. MORTGAGES—Future Property—Railroads.——A railroad may, in Louisiana, mortgage future property, and the mortgage attacks as soon as the property is acquired.—*Parker v. New Orleans, etc. R. Co.*, U. S. C. C. (La.), January Term, 1888; 33 Fed. Rep. 693.

193. MORTGAGE—Payment—Purchase Subject.——One who purchases mortgaged property with no agreement to pay the mortgage, is not liable therefor to the mortgagor, who is compelled to pay it.—*Middaugh v. Bachelder*, U. S. C. C. (Mass.), Jan. 30, 1888; 33 Fed. Rep. 706.

194. MORTGAGE—Release—Penalty.——One who has no interest in a mortgage or the debt secured thereby, is not liable to the penalty provided by law for refusing to discharge the mortgage, though it appears of record in his name.—*Murphy v. Fleming*, S. C. Mich., March 3, 1888; 36 N. W. Rep. 787.

195. MORTGAGE — Satisfaction — Authority.——A indorsed notes of B secured by a mortgage of C to raise money for C. C afterwards gave a larger mortgage to D, who satisfied the first mortgage with the knowledge of the representatives of A: *Held*, in a suit by A to set aside the satisfaction, that D was fully authorized so to do.—*Douglass v. Douglass B. Co.*, S. C. Mo., Feb. 20, 1888; 7 S. W. Rep. 280.

196. MUTUAL INSURANCE—Insurance — Assessment.——A beneficiary entitled under a certificate of a mutual aid society, may maintain an action at law against the society if it fails to make the assessments out of which his mortuary benefit should have been paid.—*Earnshaw v. Sun, etc. Co.*, Md. Ct. App., March 14, 1888; 12 Atl. Rep. 884.

197. MUNICIPAL CORPORATIONS — Annexation—Court.——The powers conferred on the district court, under Comp. Stat. § 99, ch. 14, relative to additions to cities, is judicial in its character and is valid.—*City of Wahoo v. Dickinson*, S. C. Neb., Feb. 21, 1888; 36 N. W. Rep. 813.

198. MUNICIPAL CORPORATIONS—Assessments—Irregularities.——When the resolution of a city council refers to the plat of the city engineer, which shows the matters necessary but omitted therefrom, it is sufficient. The remedy given by Code Iowa, § 478, for the recovery by a city for improvements, though irregularities exist, may be adopted, even after suit brought to recover taxes therefor paid under protest. A greater assessment than ten mills on the dollar of assessed value is allowed against property fronting on the street where the sewer is constructed.—*Dillon v. City of Davenport*, S. C. Iowa, March 8, 1888; 36 N. W. Rep. 895.

199. MUNICIPAL CORPORATIONS—Contract—Charter.——Where the charter of a corporation requires it to award contracts upon prescribed conditions to the lowest bidder, and the corporation awards the contract to one who was not the lowest bidder, because his samples of the articles to be furnished were better than those of the lowest bidder: *Held*, that the award was contrary to the charter and void.—*State v. City of Trenton*, S. C. N. J., February Term, 1887; 12 Atl. Rep. 902.

200. MUNICIPAL CORPORATIONS—Defective Street.——A city is not responsible for injuries resulting from slippery sidewalks, when their condition is the result of natural causes and the rigor of the climate and no negligence has been committed.—*Kaveny v. City of Troy*, N. Y. Ct. App., March 6, 1888; 15 N. E. Rep. 726.

201. MUNICIPAL CORPORATIONS—Injunctions.——The State, by the attorney-general, may enjoin a municipal corporation from exercising franchises not granted to it, but a bill by private parties should be dismissed where their private rights are not jeopardized.—*Bell v. Platville*, S. C. Wis., Feb. 28, 1888; 36 N. W. Rep. 831.

202. MUNICIPAL CORPORATIONS—Ordinance—Specifications.——The failure to set out the specifications of work to be done will not invalidate an ordinance, when reference is made to them as on file in the office of the clerk.—*Becker v. City of Washington*, S. C. Mo., March 5, 1888; 7 S. W. Rep. 291.

203. MUNICIPAL CORPORATIONS—Renting City Hall.——The city of Oconomowac can rent its city hall for entertainments, and the owner of a private hall cannot enjoin such action.—*Stone v. Oconomowac*, S. C. Wis., Feb. 28, 1888; 36 N. W. Rep. 829.

204. MUNICIPAL CORPORATION—School Districts—Fines. ——The act of 1876, creating the Harrodsburg school district, is constitutional. Fines and forfeitures recovered in the name of the State for violation of the ordinances of the town of Harrodsburg belong to that town.—*Board of Trustees v. Harrodsburg E. D.*, Ky. Ct. App., Dec. 1, 1887; 7 S. W. Rep. 312.

205. MUNICIPAL CORPORATIONS—Vacating Streets.—— The city of Darlington can vacate streets only by proceeding under Rev. Stat. Wisconsin, § 904.—*James v. City of Darlington*, S. C. Wis., Feb. 28, 1888; 36 N. W. Rep. 834.

206. NEGLIGENCE — Contributory.——When the evidence shows that the plaintiff was guilty of the negligence which was the direct cause of the injury, there can be no recovery.—*Cawley v. Winifrede R. Co.*, S. C. App. W. Va., Feb. 25, 1888; 5 S. E. Rep. 318.

207. NEGLIGENCE—Contributory Negligence—Practice. ——The question of contributory negligence is a question for the jury.—*Borough of Shenandoah v. Erdman*, S. C. Penn., Feb. 27, 1888; 12 Atl. Rep. 814.

208. NEGLIGENCE—Nonsuit. ——Where the evidence fails to show that the sudden jerk of a railroad car, by which plaintiff was injured, was the result of negligence on the part of the company's servants, a nonsuit is properly ordered.—*Stager v. Ridge Ave., etc. Co.*, S. C. Penn., Feb. 27, 1888; 12 Atl. Rep. 821.

209. NEGLIGENCE—Nonsuit.——Circumstances stated under which a person driving along on a railroad track and meeting an engine was held guilty of negligence and nonsuited.—*Donnelly v. Brooklyn, etc. Co.*, N. Y. Ct. App., March 13, 1888; 15 N. E. Rep. 753.

210. NEGLIGENCE—Question for Jury.——In an action for personal injuries against a railroad company, the question of negligence is for the jury, although the facts are undisputed.—*Nugent v. Boston, etc. Co.*, S. J. C. Me., Jan. 25, 1888; 5 N. Eng. Rep. 865; 12 Atl. Rep. 797.

211. NEGLIGENCE—Trespasser — Dangerous Premises. ——A city is not liable to one who, while walking along the top of a private coping adjoining a public sidewalk, falls into an excavation made by the city.—*Clarke v. City of Richmond*, S. C. App. Va., March 17, 1888; 5 S. E. Rep. 369.

212. NEW TRIAL — Presumption — Newly-discovered Evidence.——Where the evidence is conflicting, the finding of the trial court is presumed to be correct. An affidavit for a new trial on the ground of newly-discovered evidence is insufficient, if it merely states that affiant's husband made inquiries for witnesses, but that it was not discovered until after the trial that the desired proof could be made. Such a statement is too general.—*Pemberton v. Johnson*, S. C. Ind., March 6, 1888; 15 N. E. Rep. 801.

213. PARENT AND CHILD—Immovables—Consideration. ——In an action by forced heirs to annul a sale by their ancestor of an immovable to a co-heir, parol evidence may show that the real consideration was the obligation to support the grantor during his natural life, which is a sufficient consideration.—*Landry v. Landry*, S. C. La., March 5, 1888; 3 South. Rep. 728.

214. PARENT AND CHILD—Injuries to Child—Action.—— The child may sue for injuries to himself when his parent does not sue, as allowed by law.—*Propst v. Georgia, etc. R. Co.*, S. C. Ala., Feb. 22, 1888; 3 South. Rep. 764.

215. PARTNERSHIP—Authority of Partner.——A transfer of partnership assets by one partner to pay his individual debt, without knowledge of his partners, is void, regardless of the fact that the partnership is dissolved or of the ignorance of the creditor that the property belonged to the partnership.—*Cannon v. Lindsey*, S. C. Ala., Feb. 2, 1888; 3 South. Rep. 676.

216. PARTNERSHIP—Limited Partnership—Negligence. ——Where persons forming a limited partnership file in due time the prescribed certificate, and the clerk neglects to record it, such persons are not liable as general partners by reason of the clerk's negligence.—*Manhattan Co. v. Laimbeer*, N. Y. Ct. App., March 6, 1888; 15 N. E. Rep. 712.

217. PATENTS—Infringement—Drawings. —— In this instance patent 247,925, for a gas apparatus, was not infringed. When there is no ambiguity in the letters patent and nothing left for construction, the drawings should not be referred to in construing its claims.—*Kidd v. Horry*, U. S. C. C. (Penn.), Jan. 16, 1888; 33 Fed. Rep. 712.

218. PAYMENT—Condition—Precedent.—— When timber is sold, to be removed by a certain day, the payment of a note given as part of the contract price is not a condition precedent to the right of removal.—*Maul v. Eiland*, S. C. Ala., Feb. 15, 1888; 3 South. Rep. 688.

219. PLEADING—Affidavit of Defense—Payment. —— Circumstances stated under which an affidavit of defense averring payments made by defendant was held to be insufficient.—*Coulston v. Bertolet*, S. C. Penn., Jan. 23, 1888; 12 Atl. Rep. 255.

220. PLEADING — Duplicity—Demurrer. —— Duplicity or redundancy is not a ground of demurrer, except in dilatory pleas.—*Cannon v. Lindsey*, S. C. Miss., Feb. 2, 1888; 3 South. Rep. 676.

221. PLEADING — Insurance — Notice. —— When the petition in an insurance case alleged that the loss occurred on or about April 14, 1886, and that proof of loss was given on or about June 19, 1886: *Held*, on demurrer, that the petition did not show that more than sixty days intervened between the loss and the giving of proof.—*District T. v. Des Moines I. Co.*, S. C. Iowa, March 9, 1888; 36 N. W. Rep. 902.

222. PLEADING — Intoxicating Liquors. —— A complaint charging that defendant had sold intoxicating liquors within the city without a license is not demurrable because it does not state that defendant had a State and county license.—*City of Frankfort v. Anghe*, S. C. Ind., March 7, 1888; 15 N. E. Rep. 802.

223. PLEADING—Misnomer—Middle Name.——Neither a mistake in inserting the middle name of a party in the pleadings nor its entire omission will support a plea in abatement.—*Rooks v. State*, S. C. Ala., Feb. 21, 1888; 3 South. Rep. 720.

224. PLEADING—Parties—Separate Defenses.——In a suit on a promissory note against the six makers thereof, some of the defendants cannot, without the others joining, plead fraud and misrepresentation in bar or as a set-off.—*Kirby v. Spiller*, S. C. Ala., Feb. 16, 1888; 3 South. Rep. 700.

225. PLEADING—Set-off — Damages — Duplicity. —— Damages sustained by defendant, growing out of the contract sued on, may be recouped, and if they exceed the demand of plaintiff, defendant may have judgment for the excess. Duplicity in a plea in bar is no ground of demurrer.—*Ewing v. Shaw*, S. C. Ala., Feb. 15, 1888; 3 South. Rep. 692.

226. PLEADING—Statute of Frauds. —— A pleading stating a cause of action, but omitting an averment that an agreement relating to land was in writing, is sufficient on demurrer.—*Groce v. Jenkins*, S. C. S. Car., March 5, 1888; 5 S. E. Rep. 352.

227. PLEDGE—Collection—Duties. —— An agreement by a pledgee agreed that the proceeds arising from the sale of bonds and from choses in action pledged as collateral should be applied to pay the pledgor's notes, subject to the repayment of money expended by pledgee in prosecuting claims or selling securities: *Held*, that the pledgee, in the absence of a request so to do, was not bound to sell securities nor to prosecute suits, nor was he bound to prosecute suits at his own expense.—*Wilkinson v. Culver*, U. S. C. C. (N. Y.), Feb. 7, 1888; 33 Fed. Rep. 708.

228. PLEDGE—Security—Extension. —— Circumstances stated under which a pledgee of notes, with collaterals belonging to a surety appended thereto, was held to release those collaterals by renewing the notes so pledged to him and granting an extension of time thereon.—*Price v. Reed*, S. C. Ill., March 26, 1888; 15 N. E. Rep. 754.

229. PRACTICE—Instructions — Harmless Error. —— When erroneous instructions were given, but it is manifest from the record that the jury was not misled and

the party complaining was not injured, the error is harmless.—*National S. S. W. v. Wemyss*, S. C. Kan., Feb. 11, 1888; 17 Pac. Rep. 90.

230. PRACTICE—Instructions—Negligence. —— In an action for damages caused by the negligence of the defendant, to which defendant answers contributory negligence by the plaintiff, the instructions should include both propositions.—*Gamble v. Mullin*, S. C. Iowa, March 9, 1888; 36 N. W. Rep. 909.

231. PRACTICE — New Trial — Newly-discovered Evidence.——When the newly-discovered evidence on which a motion for a new trial is based, is uncertain, by reason of the doubtful character of the witness, or of contradiction, or is merely cumulative, the motion should be denied —*Mercer v. Mercer*, Ky. Ct. App., Feb. 23, 1888; 7 S. W. Rep. 307.

232. PRACTICE — Trial — Introducing Evidence. —— While the defendant is arguing a demurrer to the plaintiff's evidence the court may allow the plaintiff to introduce new evidence.—*Oberlander v. Confrey*, S. C. Kan., Feb. 11, 1888; 17 Pac. Rep. 88.

233. PRINCIPAL AND AGENT—Commissions — Defective Title.——When one employs another to sell realty for him, he can refuse to pay his commissions when a sale is prevented by his own defective title.—*Roberts v. Kimmons*, S. C. Miss., Feb. 13, 1888; 3 South. Rep. 736.

234. PRINCIPAL AND AGENT—Contracts. —— When A sends his price lists to B, saying he would give him a discount on machinery sold by him, and B made contracts and sent the notes received to A, who canceled the notes and refused to ship the machinery: *Held*, that B might recover damages from A for the breach of the various contracts in the names of the purchasers, but B was not the agent of A.—*Nagle v. Norton*, S. C. Miss., Jan. 23, 1888; 3 South. Rep. 650.

235. PRINCIPAL AND AGENT — Purchase — Trust. —— When a principal fails to furnish his agent with money to pay his taxes, and the agent buys it at a tax-sale, the agent acquires the title in trust for his principal.—*Page v. Webb*, Ky. Ct. App., Feb. 23, 1888; 7 S. W. Rep. 308.

236. RAILROAD—Injuries to Employees — Wages. —— Though a railroad may not be liable for injuries received by an employee in its business, yet it is good policy to pay him his wages while recovering therefrom when he was not guilty of undue carelessness.—*Missouri, etc. R. Co. v. Texas, etc. R. Co.*, U. S. C. C. (La.), Jan. 2, 1888; 33 Fed. Rep. 701.

237. RAILROAD—Insolvency—Equity—Receiver.——A receiver appointed by a court of equity to manage and wind up the business of an insolvent railroad company has all the powers expressed in the order appointing him and those incident thereto. He has the power to sell the property of the company and incidentals thereto to run the road until such a sale can be made to advantage.—*Vanderbilt v. Little*, N. J. Ct. Err. & App., Feb. 2, 1888; 12 Atl. Rep. 188.

238. RAILROADS—Municipal Aid—Acceptance of Stock. ——A county which has received stock of a railroad and enjoyed its benefits before the road was completed, is estopped to claim that the commissioners acted *ultra vires* in receiving it, as the road was not finished.—*Lancaster Co. v. Cheraw, etc. Co.*, S. C. S. Car., Feb. 24, 1888; 5 S. E. Rep. 338.

239. RAILROADS—Power of President. —— The president of a railroad has no authority by virtue of his office alone to let a contract on behalf of the company for the construction of its road.—*Griffith v. Chicago, etc. R. Co.*, S. C. Iowa, March 9, 1888; 36 N. W. Rep. 901.

240. RAILROADS—Regular Stations.——When railroad conductors have frequently stopped trains at a point to receive or let off passengers, but the railroad has kept no agent or office there, nor sold tickets, it is not liable, under Code N. C. § 1964, for refusing to receive and forward freight tendered to it there.—*Kellogg v. Suffolk, etc. R. Co.*, S. C. N. Car., Feb. 21, 1888; 5 S. E. Rep. 379.

241. RAILROAD COMPANIES—State Aid—Lien.——Act Arkansas July 21, 1868, created no charge upon the roads of a railroad aided by the State, and neither the State nor the bondholders can sequester the income and revenue of such roads in the hands of purchasers at mortgagee's sale.—*Tompkins v. Little Rock, etc. R. Co.*, U. S. S. C., March 19, 1888; 8 S. C. Rep. 762.

242. RECEIVER—Injunction—Attachment.——In a bill for an injunction and a receiver against a debtor and creditors to whom he has conveyed his property, it is error to appoint in chambers a receiver to collect the assets and pay them over to the creditors holding the bill of sale.—*Nussbam v. Price*, S. C. Ga., March 3, 1888; 5 S. E. Rep. 291.

243. RELEASE—Execution—Sickness.——A release of all claims for injuries received signed by the sufferer, when his sight was affected and he was dizzy, does not prevent such party from showing that he was ignorant that he was releasing such claim, though actual fraud in procuring his signature is not shown. —*Lusted v. Chicago, etc. R. Co.*, S. C. Wis., March 27, 1888; 36 N. W. Rep. 857.

244. REMOVAL OF CAUSES—Separable Controversy.—— Several separate judgment creditors brought suit as plaintiffs to set aside an assignment by the defendant as fraudulent as to its *bona fides* and preferences. All parties were citizens of the same State. Subsequently two additional plaintiffs, citizens of another State, were brought in: *Held*, that there was no separable controversy and the latter could not remove the cause to the federal court.—*Reineman v. Ball*, U. S. C. C. (N. Y.), Feb. 14, 1888; 33 Fed. Rep. 692.

245. REPLEVIN — Agent — Judgment.——When one brings replevin, claiming that he was in possession of the property as agent, he is entitled to a judgment for its full value, unless it is returned to him.—*Morris v. Burley*, S. C. Iowa, March 8, 1888: 36 N. W. Rep. 882.

246. REPLEVIN—Bond—Liability.——When the judgment, in a replevin case, is for a return of the property and for costs, the surety on the bond is liable for the costs, the property having been returned.—*Rhodes v. Burkart*, S. C. S. Car., March 1, 1888; 5 S. E. Rep. 347.

247. REPLEVIN—Deed—Title.——Replevin will not lie to recover a deed, when the title to the land is involved in the action.—*Flannigan v. Goggins*, S. C. Wis., Feb. 28, 1888; 36 N. W. Rep. 846.

248. RESISTING OFFICERS—Levying on Property.—— A debtor is not compelled to submit to a levy by an officer on exempt property without a reasonable resistance.—*People v. Clements*, S. C. Mich., March 2, 1888; 36 N. W. Rep. 792.

249. SALE—Passing Title.——A contract by a manufacturer provided that no iron work should be accepted till passed by the superintendent: *Held*, that the title to the iron work did not pass to the contractor by being delivered on the ground.—*Bagley v. Anderson*, S. C. Wis., March 27, 1888; 36 N. W. Rep. 863.

250. SALE—Warranty.——Where a party sells a mare as sound, when he knows the contrary, and the purchaser cannot ascertain the truth, the purchaser may rescind the sale within a reasonable time after discovering the fraud.—*Whitworth v. Thomas*, S. C. Ala., Feb. 23, 1888; 3 South. Rep. 781.

251. SALE — Warranty — Proof.——When A makes representations to B concerning an article purchased of him for a specific purpose, and B subsequently, as agent of C, makes a similar purchase from A, C may show such representations to establish a warranty.—*Englehardt v. Clanton*, S. C. Ala., Feb. 14, 1888; 3 South. Rep. 680.

252. SCHOOLS—Districts — Changes. —— Under Missouri laws, the petition and notice for the reorganization of the school districts of a town must specify the exact changes proposed to be made.—*School Dist. 1 v. School Dist. 4*, S. C. Mo., March 5, 1888; 7 S. W. Rep. 285.

253. SET-OFF—Contract—Connection Therewith.—— In a suit on notes for wagons sold, the defendant alleged that it was agreed he should have the sole agency for such wagons at A, but plaintiff had violated the agreement: *Held*, that the defense was good on de-

murrer.—*Andre v. Morrow*, S. C. Miss., March 5, 1888; 3 South. Rep. 659.

254. SHERIFF — Attachment — Liability. —— When a second writ of attachment is designedly executed by a sheriff or his deputy ahead of the first, the creditor of the first may recover from the sheriff what he has lost thereby.—*Grabenheimer v. Budd*, S. C. La., Feb. 13, 1888; 3 South. Rep. 724.

255. SHIPPING—Charter Party—Freight. —— When a vessel is chartered and the master is agent of the owners, it is his duty to collect freight for the charterer, and for failure to pay over such freight the vessel will be liable, unless the charter authorized the master in such matter to act as agent of the charterer.—*The Maiden City*, U. S. D. C. (Ala.), July 30, 1887; 33 Fed. Rep. 715.

256. SHIPPING—Charter Party—Parol.——A contract of affreightment by charter party by parol is valid when terminable at the will of the charterer.—*Fish v. Sullivan*, S. C. La., Feb. 13, 1888; 3 South. Rep. 730.

257. SLANDER.——To charge that a person is a thief is equivalent to charging that he or she has stolen something, and is actionable *per se*.—*Stumer v. Pitchman*, S. C. Ill., March 26, 1888; 15 N. E. Rep. 757.

258. SPECIFIC PERFORMANCE — Oral Contract — Evidence.——When, in an action for specific performance of an oral agreement to reconvey on payment of a debt, the plaintiff, failing to prove by clear and satisfactory evidence that a deed absolute on its face was not intended to invest the absolute title, is not entitled to relief.—*Corliss v. Conable*, S. C. Iowa, March 8, 1888; 36 N. W. Rep. 891.

259. SPECIFIC PERFORMANCE — Parol Contract. —— When specific performance of a parol contract for the sale of land is asked by the purchaser, it must appear that the contract is certain and definite in its terms, that the acts claimed as part performance were made in pursuance of the contract, and a refusal to execute it would operate as a fraud on the purchaser, and he cannot be easily compensated in damages. Payment of the purchase money will not take the case out of the statute of frauds, but possession sometimes will.—*Gallagher v. Gallagher*, S. C. App. W. Va., Feb. 18, 1888; 5 S. E. Rep. 297.

260. SPECIFIC PERFORMANCE — Statute of Frauds — Failure to Plead.——In a suit for specific performance, when the defendant fails to plead, answer or demur, he can claim no benefit from the statute of frauds.—*Angel v. Simpson*, S. C. Ala., Feb. 21, 1888; 3 South. Rep. 758.

261. STOCK-KILLING—Negligence.——A railroad may be liable for injuries to a horse not struck by its train, but only when some wrong is done by its servants.—*New Orleans, etc. R. Co. v. Thornton*, S. C. Miss., Feb. 27, 1888; 3 South. Rep. 654.

262. TAXATION—Deed—Limitation of Action. —— The limitation of three years in which to assail a tax-deed after occupation taken does not apply when the plaintiff is not attacking such deed, but claims under a similar deed subsequently made.—*Lewis v. Siebles*, S. C. Miss., Feb. 27, 1888; 3 South. Rep. 652.

263. TAXATION — Deed Validity.——The omission of the name of the county and State from a tax-collector's deed will not invalidate it when there is no latent ambiguity in the deed.—*Lewis v. Siebles*, S. C. Miss., Feb. 27, 1888; 3 South. Rep. 652.

264. TAXATION—Exemption—Railroad.——The act of 1877, ch. 21, § 1, extending the exemption of the lands of the Wisconsin Central Railroad from taxation for three years, began at the end of the original exemption, and not from the date of the act. Upon completion of the road the lands were liable to taxation, though the patent therefor had not issued.—*Wisconsin, C. R. Co. v. Comstock*, S. C. Wis., Feb. 28, 1888; 36 N. W. Rep. 843.

265. TAXATION—Foreign Corporation—Agent.——The legislature may levy a tax on the gross receipts of a foreign corporation and require it to be paid by a resident agent.—*State v. Sloss*, S. C. Ala., Feb. 21, 1888; 3 South. Rep. 745.

266. TAXATION—Increasing Valuation—Injunction.—— When a township board of equalization increases the value of certain real estate for taxation in a year when the State board of equalization does not meet, the collection of the increased tax thereby imposed should be restrained.—*Goold v. Lyon Co.*, S. C. Iowa, March 9, 1888; 36 N. W. Rep. 906.

267. TAXATION—Invalid Tax-deed — Repayment. —— Laws Wis. 1880, ch. 305, § 1, providing for the return of money paid when the tax-deed was adjudged invalid, is constitutional, and a judgment entered without paying such money is erroneous.—*Wisconsin C. R. Co. v. Comstock*, S. C. Wis., Feb. 28, 1888; 36 N. W. Rep. 843.

268. TAXATION — Limitation — Legislature. —— The constitution of Alabama limited taxation to three-fourths of one per cent, but allowed the city of Mobile to collect that amount in excess of the State tax. The legislature abolished the city, but collected all the tax allowed: *Held*, that the act of the legislature was constitutional.—*Hare v. Kennerly*, S. C. Ala., Feb. 14, 1888; 3 South. Rep. 683.

269. TAXATION—Notice of Sale—Title.—— An affidavit of posting notices of sale for delinquent taxes is fatally defective if it does not state they were posted at the places and for the length of time required by law. When, in ejectment, defendant only claims under a tax-deed against the plaintiff, the defendant is estopped from claiming that the title is still in the United States.—*Wisconsin, etc. R. Co. v. Wisconsin, etc. R. Co.*, S. C. Wis., Feb. 28, 1888; 36 N. W. Rep. 837.

270. TAXATION — Sale — Injunction — Tender. —— A plaintiff who seeks an injunction to restrain a tax-sale of his land must tender the taxes due, and aver in his complaint that he brings the money into court.—*Morrison v. Jacoby*, S. C. Ind., March 7, 1888; 15 N. E. Rep. 806.

271. TAXATION—Tax-collector—Estoppel.——Where a tax is authorized by an illegal vote of the township, and the tax-collector does not collect it, and is released from liability by the town committee, the township is not estopped from proceeding against him on his official bond by such release.—*Painter v. Township, etc. Co.*, N. J. Ct. Chan., Feb. 7, 1888; 12 Atl. Rep. 187.

272. TAXATION—Goods in Transit.——Goods *in transit* from one State to another are not subject to taxation, but they are when they arrive at their destination and are offered for sale.—*Pittsburg, etc. Co. v. Bates*, S. C. La., March 5, 1888; 3 South. Rep. 642.

273. TENANTS IN COMMON.——One tenant in common, with the consent of his cotenant, who has made improvements on the common property, is entitled to maintain an action against his cotenant for his share of the expense.—*Jordan v. Soull*, S. J. C. Me., Dec. 30, 1887; 12 Atl. Rep. 786.

274. TRUSTS—Fraud on Creditors.——When a debtor conveys to a trustee for B, who takes no part in the transaction, in order to obtain a compromise with his creditor, B can be charged with a trust in his favor.—*Jordan v. Moore*, S. C. Miss., Feb. 13, 1888; 3 South. Rep. 737.

275. TRUSTS—Powers—Separate Estate. —— A post-nuptial settlement, conveying lands to a trustee for the use of the wife, with power to sell and reinvest, does not authorize the trustee to execute a deed to secure bonds given by him for the purchase price of property purchased by him for the benefit of the wife.—*Green v. Clairborne*, S. C. App. Va., May 19, 1887; 5 S. E. Rep. 376.

276. TRUST—Resulting—Foreclosure Sale.——When a mortgagor is in possession under an agreement with the purchaser at foreclosure sale that he shall have time to redeem, a trust results for the benefit of his heirs upon his death.—*Gaines v. Saunders*, S. C. Ark., March 3, 1888; 7 S. W. Rep. 301.

277. UNLAWFUL ENTRY AND DETAINER—Collusive Attornment.——Defendant's agent let her land to a tenant, who afterwards attorned to the holder of a tax-

deed to the premises. Defendant then re-entered peaceably with the tenant's assent: *Held*, that an action for unlawful entry and detainer could not be maintained.—*Benjamin v. Reach*, S. C. Miss., March 5, 1888; 3 South. Rep. 657.

278. VENDOR—Transfer of Notes — Restitution. —— When a vendor transfers the note received in payment without indorsement and without recourse, his right to demand payment or restitution of the sale in case of non-payment ceases.— *People's Bank v. Cage*, S. C. La., Feb. 13, 1888; 3 South. Rep. 721.

279. VENDOR AND VENDEE—Bona Fide Purchaser—Notice.——A *bona fide* purchaser of land, who has no notice of a prior unrecorded deed of that land can convey as good a title as he himself possesses to a purchaser who has notice of that unrecorded deed.—*Roll v. Rea*, S. C. N. J., Feb. 27, 1888; 12 Atl. Rep. 905.

280. VENDOR AND VENDEE—Bond for Title.——Where a vendor retains the title in himself, and gives a bond conditioned to make a conveyance when all the purchase money shall be paid, and that bond has been recorded, his lien is absolute and not secret, and is as good against the assignee of the vendee as against the vendee himself.—*Robinson v. Appleton*, S. C. Ill., March 26, 1888; 15 N. E. Rep. 761.

281. VENDOR AND VENDEE—Deficiency—Abatement of Price.——Two tracts of land were supposed by vendor and vendee to contain 892 acres. A diagram was referred to by both to ascertain the number of acres. On ascertaining a deficiency of 210 acres, equity will allow an abatement of the purchase price.—*Camp v. Norfleet*, S. C. App. Va., May 5, 1887; 5 S. E. Rep. 374.

282. VENDOR AND VENDEE — Specific Performance—Third Person.——A vendee who has brought an action to recover damages for breach of the contract of sale, and afterwards accepts specific performance of that contract, is not liable in damages to a third person who has contracted with the vendor for the same property. —*Tamsen v. Schaefer*, N. Y. Ct. App., March 6, 1888; 15 N. E. Rep. 731.

283. VENUE—Change—Several Counts. —— When the court refuses to change the venue on account of two counts, but has jurisdiction of a third, and the plaintiff on his own motion strikes out the two counts, the action of the court will not be reviewed on appeal.—*Davis v. Kimball*, S. C. Iowa, March 9, 1888; 36 N. W. Rep. 900.

284. WATERS—Dams—Fox River.——The former decision is modified to leave the question of the rights of the plaintiff and the United States to the Fox river open. —*Green Bay, etc. Co. v. Kaukauna Co.*, S. C. Wis., Feb. 28, 1888; 36 N. W. Rep. 828.

285. WATER—Negligence. —— Where a State, in constructing a reservoir, digs down to a bed of gravel, through which the water of the reservoir percolates, and injures the property of others, they are entitled to damages from the State.—*Reed v. State*, N. Y. Ct. App., Feb. 28, 1888; 15 N. E. Rep. 735.

286. WILL—Statute—Revocation.—— Construction of New York statutes relative to the revocation of wills. A devise in favor of a remainderman is not affected by a release by him, made during the testator's life-time in consideration of a payment of money, of all interest in testator's estate, provided that the devise in his favor remains unrevoked by the testator at the time of his death.—*Burnham v. Comfort*, N. Y. Ct. App., Feb. 28, 1888; 15 N. E. Rep. 710.

287. WAYS—Right of Way — Injunction. —— Circumstances stated under which a party claiming a way of necessity over the lands of another is not entitled to a preliminary injunction.—*Ewert v. Burtis*, N. Y. Ct. Chan., Feb. 29, 1888; 12 Atl. Rep. 893.

288. WHARVES—Fees—Habor Masters.——The legislation relative to harbor masters does not apply to vessels at private wharves on the right bank of the river.— *Harbor Masters v. Morgan, etc. Co.*, S. C. La., Feb. 13, 1888; 3 South. Rep. 627.

289. WILL—Cancelation.——Declarations of a testator are inadmissible to prove a cancelation of a will as to one or more legatees by canceling their names. A partial cancelation can only be effected by a new will or a codicil, under Alabama laws.—*Law v. Law*, S. C. Ala., Feb. 21, 1888; 3 South. Rep. 752.

290. WILL—Construction.——An item in the will as follows: "I give to my daughter * * * the interest of the equal undivided one-sixth interest, part or portion of my whole estate:" *Held*, to mean the one-sixth of the amount left for distribution after the payment of the debts of the testator and the expenses of administration.—*Smith v. Terry*, N. J. Ct. Err. App., Feb. 2, 1888; 12 Atl. Rep. 204.

291. WILLS — Contradictory Clauses.——When two clauses in a will are contradictory, the latter will prevail.—*Ball v. Ball*, S. C. La., March 5, 1888; 3 South. Rep. 644.

292. WILL—Devising Other Property—Election.——A testator devised all his estate to his wife for life with remainder over. Much of the property so devised belonged to the wife: *Held*, that her accepting and holding under the will divested her of all her interest in such property, except a life estate under the will.— *McIlvain v. Porter*, Ky. Ct. App., Feb. 23, 1888; 7 S. W. Rep. 309.

293. WILL—Nearest and Lawful Heirs.——A testator devised property in remainder to the nearest and lawful heirs of mine and that of my wife: *Held*, that a party adopted as her son by the widow after the death of the testator was not such heir.—*Reinders v. Koppelman*, S. C. Mo., March 5, 1888; 7 S. W. Rep. 288.

294. WILL—Probate — Statute—Register.——The statute of Pennsylvania provides that the probate of a will by a register shall be conclusive, unless a *caveat* is filed or an action brought within five years. When the probate of a will by a register is set aside by the orphan's court, the judgment of that court is conclusive as to the real estate of the testator.—*McCoy v. Clayton*, S. C. Penn., March 5, 1888; 12 Atl. Rep. 860.

295. WILLS — Survivorship.——A will divided land among four devisees, providing that when either died his share should be divided among the rest: *Held*, that upon the death of three of the devisees, one of them leaving heirs, the survivor took the whole estate.— *Dowling v. Rober*, S. C. Miss., Feb. 27, 1888; 3 South. Rep. 654.

296. WILL—Testamentary Capacity—Revocation.—— It is error to instruct a jury, in a case of contested will, that a higher degree of testamentary capacity is necessary to make a valid will than to revoke one which has been made.—*McIntire v. Worthington*, Md. Ct. App., Dec. 19, 1887; 12 Atl. Rep. 251.

297. WILL — Trust.——Circumstances stated under which it was held that under a will parties to whom the share of a deceased brother had been given were held to be trustees for his children.—*Jones v. Jones*, S. C. Ill., March 26, 1888; 15 N. E. Rep. 751.

298. WITNESS—Credibility — Judge.——A remark by the judge, "Don't lead the witness. They will say anything you want them to say," is error.—*Jefferson v. State*, S. C. Ga., March 3, 1888; 5 S. E. Rep. 293.

299. WITNESS—Wife of Codefendant.——In a trial of two persons jointly indicted, the wife of one may testify for or against the other under instructions from the court to restrict the testimony to such defendant.— *State v. Adams*, S. C. La., March 5, 1888; 3 S. E. Rep. 733.

300. WRITS — Service by Publication — Appeal.—— Recital in the judgment entry of proof of due and legal service on the defendant, is insufficient on appeal to show constructive notice by publication.—*Diston v. Hood*, S. C. Ala., Feb. 20, 1888; 3 South. Rep. 746.

CORRESPONDENCE.

PROFESSOR EWELL.—The friends of Dr. Ewell, who are very numerous among the readers of the JOURNAL, will be gratified by the following notice which was inclosed to us by a correspondent:

Hon. Marshall D. Ewell, LL.D., one of the faculty of the Union College of Law, has been appointed lecturer upon medical jurisprudence in the law school of Cornell University for the next college year. This does not sever his official relations to the Union College of Law, in which he will still give his usual courses of instruction.—*Journal American Medical Association.*

QUERIES AND ANSWERS.*

QUERY NO. 26.

A conveys to B and C (husband and wife) a tract of land situated in Kansas. C dies intestate, leaving B and two children surviving her. B subsequently marries D. Is B the sole heir-at-law of C, and would a conveyance by him and his wife D convey the whole estate in said land? E. M.

QUERY NO. 27.

On the 10th inst., A, who was the owner of a valuable stallion, agreed with B, who was the owner of a certain number of common horses, to trade said stallion for a designated number of said horses, A having the option to take his choice of either of two certain teams there was among said horses, when he should take said horses from the premises of B, and which time should be in three days after said date. The stallion was at said time in a livery stable, and B was to take the same therefrom early the next day after said date of agreement. On going to the livery stable early the next day B found said stallion sick, and before two o'clock of the same day said stallion died in said stable. Whose was the stallion at the time of his death? And can A enforce his contract against B for the horses, he having made his choice of one of the two teams involved at the time designated? Or on B's refusal to let him have the same, can he recover damages for breach of contract? The contract to trade was not in writing, and the transaction was in Nebraska, and the stallion was in good health at the time of the agreement to trade. W. B.

QUERY NO. 28.

One Collier, owned a tract of land in Missouri. Suit was instituted against him alone in the circuit court for delinquent taxes on the tract, resulted in a judgment against him which declared the taxes to be a lien on the land. At a sale under this judgment one Smith became the purchaser and received a sheriff's deed therefor. Smith then conveyed the tract to one Mrs. Blevins for the consideration expressed in the deed of $1,000. This deed contained the words "grant, bargain and sell" in the granting clause, and a general warranty in the *habendum* clause. During all this time Collier had a wife who was not a party to the tax suit. Mrs. Blevins never having been disturbed in the possession which S delivered to her, sought out Mrs. Collier for the reason that she could not find a purchaser for the tract, on account of the possibility of Mrs. C sometime becoming entitled to dower, and procured a deed of release of her and husband for which she paid her $150, and to her attorneys for services in obtaining release $25. She now sues for breach of the covenants against incumbrances contained in the words "grant, bargain and sell" for the aggregate sum of $175. First. Did the tax sale and deed bar dower? Second. Could Mrs. B recover anything more than nominal damages? S.

QUERIES ANSWERED.

QUERY NO. 23 [*26 Cent. L. J. 407.*]

An action was brought by A against B, an attorney, on a contract which is void because of champerty. B appeared and answered setting up a general denial, but not specially pleading the invalidity of the contract as a defense. Can B take advantage of the champerty, either by motion to dismiss the complaint, or by proving it as a defense. H. Y.

Answer.—When the illegality appears in the declaration the defendant may demur, move in arrest of judgment or support a writ of error. 1 Chitty Plead. 307. The defendant must specially plead the illegality of the contract. 1 Chitty Plead. 507; Wait's Act and Def. 70. This, of course, is based on the idea that the illegality is not apparent on the face of the declaration. Bliss says that if a deed or a note is sued on when the consideration need not be stated, the illegality must be set up in the answer; but on simple contract, when the plaintiff must state the consideration, he implies that the illegality may be proved on the general issue. Bliss Code Plead. § 274 In the absence of knowledge of the decisions of the State, we would advise a new answer setting up this defense. M. F.

QUERY NO. 24 [*26 Cent. L. J. 432.*]

The enabling act for Nebraska, passed by Congress April 19, 1864, describes the eastern boundary of the State as follows: "Thence down the middle of the channel of said Niobrara river and following the meandering thereof to its junction with the Missouri river, thence down the middle of the channel of said Missouri river and following the meanderings thereof to the place of beginning." Prior to the year 1877, a large tract of land, embracing several thousand acres, was included within the boundaries of the State of Iowa. This tract of land was joined to the State of Iowa by a very narrow isthmus, and the peninsula was bounded on the north, west and south by the main channel of the Missouri river. During the year 1877, the Missouri river cut through and formed a new main channel across the narrow isthmus. Thus the land formerly on the east side of the main channel of the river, and within the jurisdiction of the State of Iowa, is now on the west side of the main channel of the Missouri river, and apparently within the boundaries and jurisdiction of the State of Nebraska. Which State, Iowa or Nebraska, is now entitled to jurisdiction over the tract of land mentioned? Cite authorities. Are there not islands in the Mississippi river lying between Iowa and Illinois, which have changed ownership (State jurisdiction) by reason of a change in the main channel of the Mississippi river? D. M. S.

Answer.—The channel which the river has abandoned remains as before the boundary line. Missouri v. Kentucky, 11 Wall. 395. The peninsula is still in the State of Iowa. L. B.

QUERY NO. 25 [*26 Cent. L. J. 432.*]

A died intestate leaving a personal estate amounting to $10,000. B, on the 30th day after A's death, was duly appointed administrator. During the period which elapsed between the death and the appointment, where was the title to the estate? Cite authorities. S.

Answer.—The heirs have the equitable title, and is

not always necessary to appoint an administrator. Lewis v. Lyons, 13 Ill. 117; 1 Williams on Ex. 629, *n.* For nearly all purposes the title of an administrator relates back to the death of the intestate. 1 Williams on Ex. 630, *et seq.* M. R.

RECENT PUBLICATIONS.

THE LEGAL RELATIONS OF INFANTS, PARENT AND CHILD, AND GUARDIAN AND WARD, and a Particular Consideration of Guardianship in the State of New York, Including Practice and Procedure in Surrogates Courts and in the Supreme Court, and County Courts and the Superior Courts of Cities in Matters of Guardianship, and in Actions Against Infants to Compel a Conveyance of Real Estate, and for the Partition of Real Estate; also an Appendix of Forms for all Such Proceedings. By G. W. Field, Author of A Treatise on the Law of Damages, Private Corporations, Federal Courts, etc., etc. Rochester, N. Y.: Williamson & Higbie, Law Booksellers and Publishers. 1888.

The title-page of this work, of which the foregoing is a copy, indicates very distinctly its character. It is a practical treatise on the subject of exceeding importance to all practitioners in the courts of New York, and must prove very valuable to them and their clients. The exposition of the law concerning infants in their relations to their parents, to their guardians, and to third persons, with reference to their estates and personal rights, is very complete, and the practical directions relating to the proceedings in the proper courts which affect infants and guardians we think would satisfy the most exacting. The work is prepared with great care, the evidence of which is to be found in its orderly arrangement and the table of cases cited, unusually full for a volume of its dimensions. The same remark may be applied to the index; it is also very copious. We commend the work to all lawyers who are interested in the subjects of infancy and guardianship as they fare treated in the New York courts.

THE AMERICAN REPORTS, Containing all Decisions of General Interest Decided in the Courts of Last Resort of the Several States, with Notes and References, by Irving Browne. Vol. LX. Containing all Cases of General Authority in the following Reports: 80, 81, 82 Alabama; 71 California; 120 Illinois; 111 Indiana; 71 Iowa; 5 Mackey; 59 Michigan; 64 Mississippi; 91 Missouri; 61 New Hampshire; 49 New Jersey Law; 106 New York; 96 North Carolina; 114 Pennsylvania State; 25 South Caroiina; 67 Texas; 68 Wisconsin. Albany: John D. Parsons, Jr., Publisher. 1888.

We are in receipt of the sixtieth volume of the excellent collection of selected cases, and as we have so recently and so repeatedly noticed the predecessors of the volume we can say nothing new about it. This last issue of the work is fully up to the high standard of the collection, and like all the other volumes is enriched by the careful and exhaustive annotations bestowed by the learned and accomplished editor upon all the work which passes from his hands. The series is too well known to the profession to need our commendation which nevertheless we very heartily bestow upon it.

JETSAM AND FLOTSAM.

UNDER THE CODE.—The court (a country justice): "Well, no, its not necessary to hire a lawyer. I can draw up the papers for you myself."

The plaintiff: All right, go ahead.

"The court" thereupon adjusted his spects, and after consulting some papers among his files, *in consimili casu*, as he supposed, wrote out the following, in which the liberty is hereby taken of changing the names and making a few blanks:

State of Missouri, County of —, ss. The State of Missouri, at the relation and to the use of Samuel Jones, plaintiff, against John Smith, defendant. Before John Doe, J. P., — Township.

"Plaintiff states that defendant, on the — day of —, A. D., —, got on and upon a certain pile of lumber at the township of —, County and State aforesaid, which said pile of lumber was then and there of the goods and chattels, rights and credits of plaintiff; and then and there did draw upon plaintiff a certain revolving pistol, which he said defendant then and there, in his right hand had and held, and aiming the same at plaintiff said: 'You infernal rascal, if you come any nigher my lumber I'll shoot h—l out of you;' and then and there, with force and arms, in the manner and by the means aforesaid, did drive plaintiff away from his said pile of lumber, to the damage of plaintiff in the sum of twenty-five dollars, for which he prays judgment."

Having evolved this "concise statement of the facts constituting the cause of action," the "court" required the plaintiff to subscribe and swear to the same, which being done his Honor issued a warrant for the arrest of the defendant. When the defendant was brought in by the constable, he was required by the "court" to give security for costs, and "the case" was set for hearing on a given day.

It is hardly necessary to add that the lawyers had a picnic when they were finally called in.

LAWYERS AND QUOTATIONS.—Judges and lawyers have contributed their quota to the common stock of popular sayings:

It is Francis Bacon who speaks of matters that "come home to men's business and bosom," who lays down the axiom that "knowledge is power," and who utters that solemn warning to enamored Benedicts, "he that hath a wife and children hath given hostages to fortune."

We have the high authority of the renowned Sir Edward Coke for declaring that "corporations have no souls," and that "a man's house is his castle."

The expression, an accident of an accident," is borrowed from Lord Thurlow. "The greatest happiness of the greatest number" occurs in Benthan, but as an acknowledged translation from the jurist Beccaria.

To Leviathan Hobbs we owe the sage maxim, "words are wise men's counters, but the money of fools." It is John Selden who suggests that by throwing a straw into the air you may see the way of the wind; and to his contemporary oxenstiern, is due the discovery, "with how little wisdom the world is governed."

Mackintosh first used the phrase, "a wise and masterly inactivity." "The schoolmaster is abroad," is from a speech by Lord Brougham. It does not mean that the teacher is "abroad," in the sense of being absent, as many seem to interpret the phrase, but that he is "abroad" in the sense of being everywhere at work.

In the familiar phrase, "a delusion, a mockery and a snare," there is a certain Biblical ring which has sometimes led to its being quoted as from one or other of the Hebrew prophets; the words are, in fact, an extract from the judgment of Lord Denman at the trial of O'Connell.